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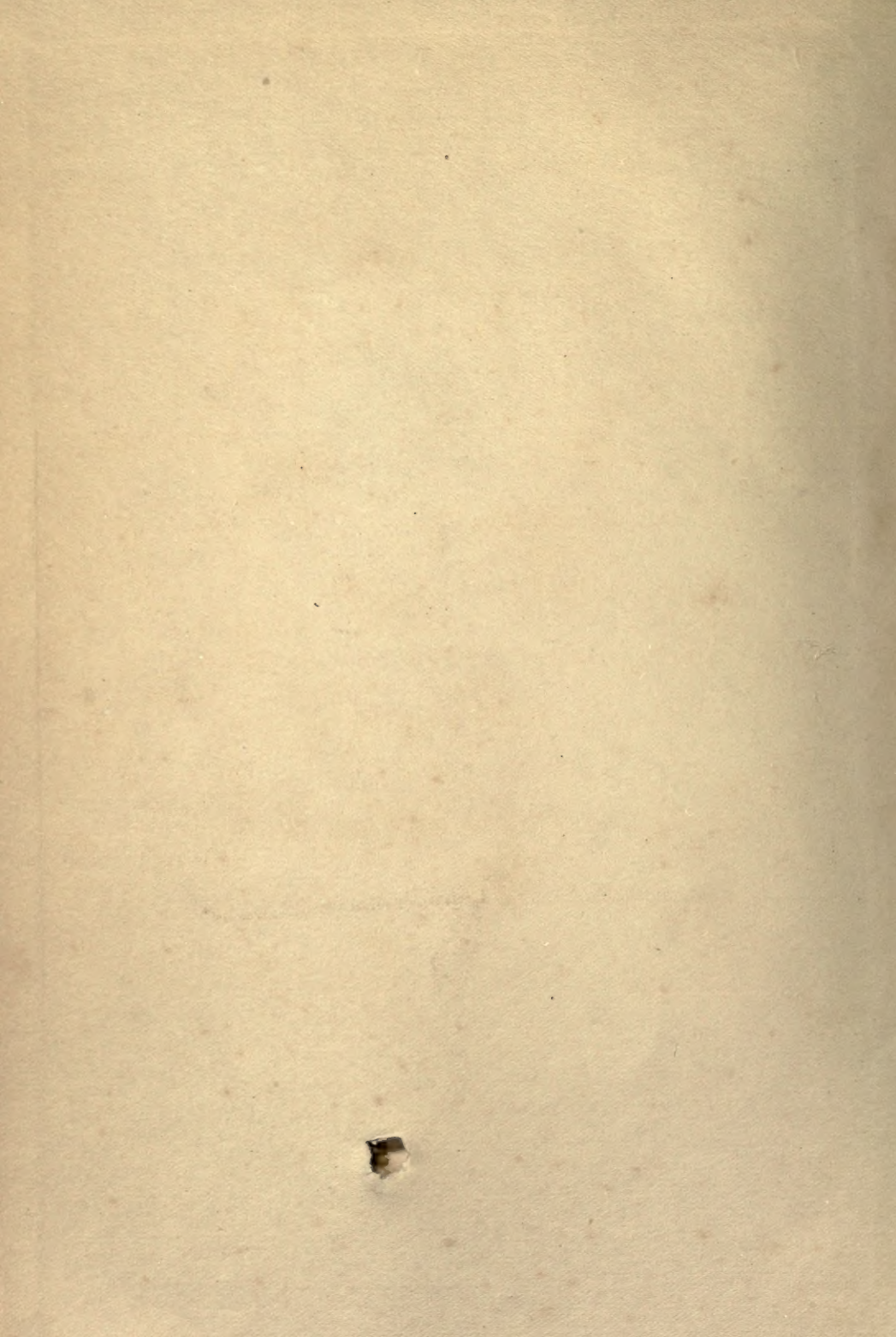


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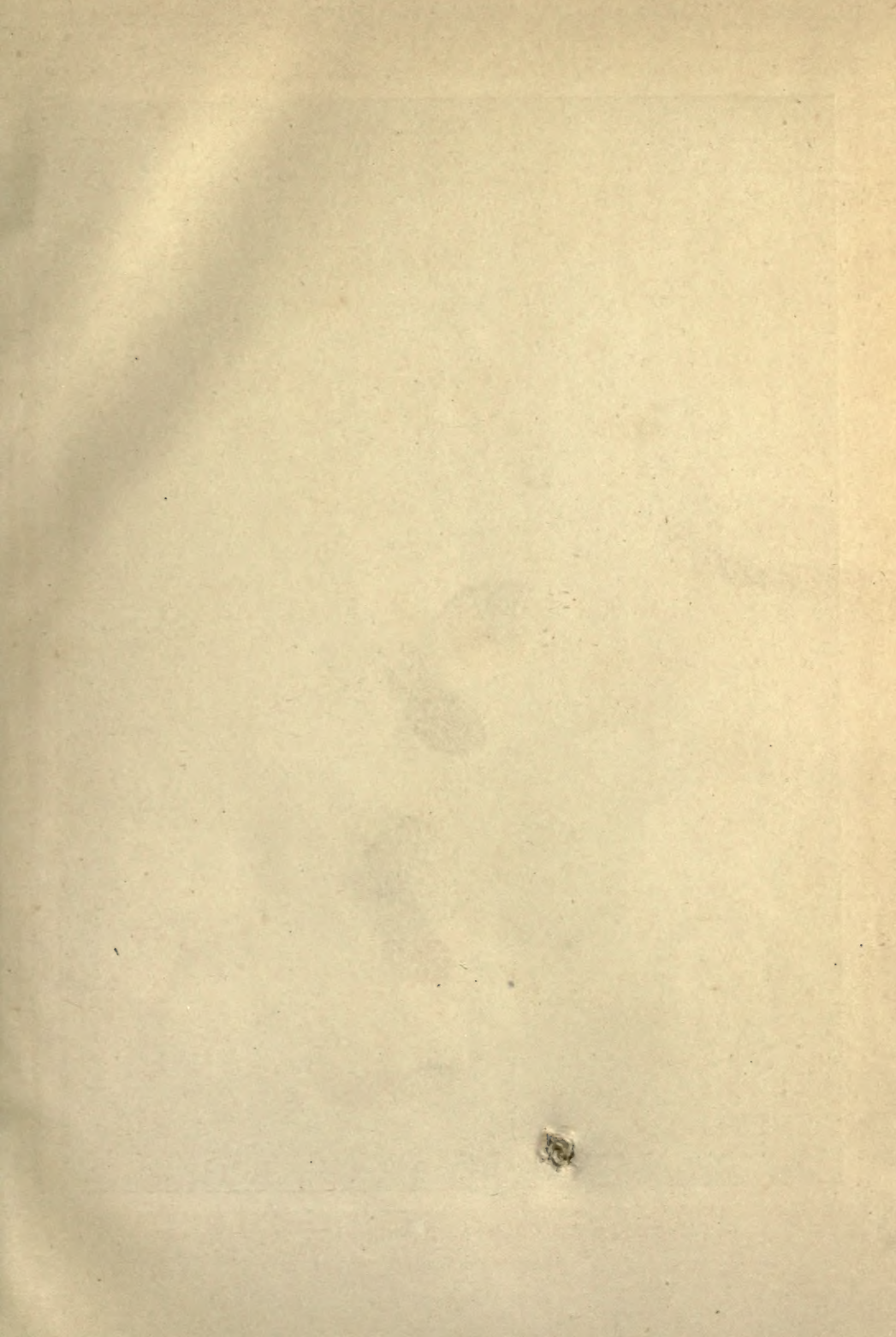




CASSELL'S FAMILY LAWYER.



WILLIAM BAKER







LORD RUSSELL OF KILLOWEN, LORD CHIEF JUSTICE OF ENGLAND.

*(Photo: Russell & Sons, Baker Street, W.)*

CASSELL'S  
FAMILY LAWYER

BEING

*A POPULAR EXPOSITION OF THE CIVIL LAW OF  
GREAT BRITAIN*

BY

A BARRISTER-AT-LAW

SPECIAL EDITION

WITH FULL-PAGE ILLUSTRATIONS AND FACSIMILES OF LEGAL DOCUMENTS

VOL. I

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# THE FAMILY LAWYER.

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## INTRODUCTION

SHOWING WHY THIS BOOK IS WRITTEN AND WHAT IT IS  
ALL ABOUT.

IT has been in my mind for a long time to write a popular book on Law. The idea was suggested to me by a friend, who said : "There are popular books on science, there is a popular book on medicine, there are popular books of travel and biography. Social questions have been treated popularly, and yet there is no readable popular work on law." Now my whole object in putting *The Family Lawyer* before the public is to explain, in a manner so simple that everyone can understand it, the law of England and Scotland-as it affects average people in their everyday life.

I do *not* mean to try to instruct laymen how to conduct actions without legal advice, because my experience tells me how useless this would be. There are so many forms of procedure, knowledge of which can only be acquired by actual practice, that it would be impossible to explain them in writing. It is something like the business of a dyer in the carpet trade. A man who follows that branch of the trade goes into the dyeing department as soon as he leaves school. There he watches the men at work, and after many months spent in observation, is allowed to assist at some of the more simple processes. After several years he is allowed to assist in the more difficult parts of the work. And even then he *may* never become a really good dyer. It is just the same in the conduct of actions. You can no more tell a man how to conduct an action in a court of law than you can write a book on how to become a carpet dyer. Experience, and experience only, teaches the art.

One who intends to be a solicitor, for instance, must serve five years' apprenticeship to a qualified man. During these five years he enters into the work and picks up rather than is taught the way in which to go about proceedings necessary to conduct actions. He must also pass examinations in the theory of law ; and even after the experience of the five years, the man must be of more than average smartness if he is really qualified to do the work of a solicitor. A barrister, again, whose work lies more in the courts, during his term of studentship attends the courts of justice, and watches how experienced men conduct the trial of causes. No amount of explanation will teach a man so much in that respect as a couple of hours' observation of a Clarke, a Webster, or a Lockwood.



I am well aware that there have been laymen who have conducted their own cases with skill and ability to a successful issue—the most notable of these being the celebrated Horne Tooke, that wittiest and most unclerical of clergymen, who fairly worsted the Attorney-General of the day on more than one occasion. But then Horne Tooke was a wit, and we are not all wits. Moreover, his cause was one commanding popular sympathy to an enormous extent; and there is little doubt that the jury acquitted him in order to show their disapproval of a tyrannical government and its methods rather than because they were convinced of the reverend gentleman's innocence.

But, after all, it is only exceptional cases that ever go before the judges at all. What the average man wants, is to know what the law is on everyday matters. Strange as it may appear, the amount of misconception, even amongst persons otherwise well informed, is appalling. I hear somebody say: "No wonder ordinary people do not know the law, when it is changing every year and almost every day. New Acts of Parliament are always being passed, and if I read *The Family Lawyer* to-day, how do I know that the law will not be altered to-morrow?"

To this I reply that you are right as far as you go. Parliament *is* continually pouring forth a stream of legislation; but that *legislation rarely touches the law as it affects people in their ordinary everyday life*. I venture to say deliberately that the law relating to business and trade, the law as it affects the household, the family man, the shopkeeper and the merchant, the employer and the workman, the mistress and her maid, has not changed *appreciably* since Queen Anne died.

The Acts of Parliament which flow so unceasingly from Westminster are, of course, law, but they are not that kind of law which affects the ordinary relations between man and man. The fact is that the structure of what is known as the common law (I do not refer to criminal law) is such a massive old building that it would be unsafe to attempt to make any extensive alterations. Moreover, that law has been built up by succeeding generations of judges through whose means it has "slowly broadened down from precedent to precedent," and it is capable of such adaptations to the endless variety of circumstances which rise in the conduct of affairs, that there is really very little to amend. The last fact has been recognised by all the great legal reformers. Bentham, for instance, and Lord Chancellor Brougham, whose ardent wish it was to "make justice cheap," thought that the need for reform was not in the principles of the law, but in its procedure. For instance, under the old practice of the courts the trial of an action could on various frivolous pretexts be delayed for years. But this was merely a question of administration, and not of the law itself. During the reign of Queen Victoria we have had scores of Acts placed upon the statute book to render proceedings shorter and less expensive; but the principles upon which the rights of the contending parties must eventually be decided have been left almost untouched.

It may be that in the near future we shall see a codification of the common law, but this will make no difference to the law at all. It will be simply a work of collecting into one Act of Parliament all the principles governing one particular branch. Already this has been done in one or two cases. In the year 1882, that part of the common law which had to do with Bills of Exchange and Promissory Notes and Cheques was gathered together into one statute. The same thing was done

in 1891 with the law of Partnership, and again in 1893 in respect of that important subject, the Sale of Goods. In all these cases the only effect was to make the law on these subjects more explicit and more compact. The difficulty experienced by anyone who wishes to ascertain what the law is on a particular point is really of not knowing where to look for it.

I purpose in this book to confine myself entirely to elucidating **the law as it affects the average man**. It is not my intention to make it merely a book of reference. It will, I hope, be of value in that way, but the intention in writing it is to make it a really readable and interesting book, which can be read with as much interest and as much profit as a book of biography, travel, or science.

I know perfectly well that to the average man the phrase "an interesting law book" seems a contradiction in terms, and I do not say that he has no reason for his belief. At the same time, I venture to assert, with the confidence of a man who knows, that there is *no more interesting study than the study of the law*. We are all acquainted with the proverbial expression about "the dry bones of the law." This is a libel. The bones of the law are not any more dry than any other bones, and the law in itself is not all bones. How can it be, when it deals entirely with human beings and their conduct one towards another? The reason why the study of the law is repellent to all except those who intend to practise it as a profession, admits of a very simple explanation. It is because authors who have written on legal subjects have invariably chosen to clothe their thoughts in a hideous garb of technical jargon.

I very well remember, when I started to read law, how difficult the subject seemed to me. I read through page after page of matter, and at the end of it knew very little more about the law of my country than I did at the beginning. I might have tried to read a Chinese work on the Confucian philosophy with as much instruction and profit. I speedily found that the only way to understand these books was by the aid of a dictionary—not the ordinary Webster or Johnson, **but a legal dictionary**; and as soon as I had mastered the terms used by a legal author, it became possible for me to read his works with advantage. When the language of the law was no longer an unintelligible jargon, the study became not merely bearable but pleasant. I found that the common law of England rested on a few great fundamental principles; that the application of those principles was extremely logical; and that even those cases of hardship which are sometimes reported in the press only result from the severely reasonable way in which principles are carried to their logical conclusion, and by the determination of the judges not to interfere with good laws because they occasionally work hardship in particular and exceptional cases.

It is an axiom amongst lawyers that hard cases make bad law; by which is meant, that if a judge allows himself to deviate from the strict line of legality because of the hardship involved in a particular case, he will do more harm than good in the long run. Whenever a judge decides a case, that case becomes a precedent or guide for all future cases in which the same point is involved; and it is easy to see that if, to do justice (or what he imagines to be justice) in an exceptional case, the judge strains the law, he is making matters much worse for the average people who come after.



I have always thought the hardest part of a judge's duty to be that of keeping his balance—of refusing to be led away by sympathy for the foolish or ignorant man who, without suspecting it, has been put legally in the wrong by a clever rogue. How often do we hear judges say: "I am very sorry to be obliged to do it, but I must in this case give judgment for the plaintiff"? Some people say, when such remarks fall from judicial lips, "There must be something wrong with the law when the judge himself enforces it with reluctance." Not necessarily. It may be, and probably is the fact, that the law is perfectly good, and that this case is an exceptional one. Just as no scheme of taxation is possible that would be perfectly fair all round—*i.e.* under which every man would pay in exact proportion to his ability—so I do not think it possible to have a system of law which would not work hardship in individual cases. You can only lay down rules founded on principles you believe to be the best; and having once laid down a principle and a rule, suffer no deviation therefrom. I think it will be found in reading this work, that on the whole the Common Law of Great Britain, which is founded on the usages, customs, and traditions of the people themselves, is the essence of common sense; and I believe that if Parliament had let well alone and placed fewer Acts on the Statute Roll, the law would at the present time be much better, as it certainly would be much simpler.

It is a maxim common to the law of all civilised communities that "*ignorance of the law excuseth no man.*" This is necessarily so; for society could not hold together for a single week if men were allowed to be excused because they did not know the law. But though, in *theory*, everyone knows the legal requirements of all possible situations, in *fact* the majority of people know very little indeed. My experience tells me that husbands are vastly ignorant of their legal relations to their wives; wives to their husbands; parents to their children; and children to their parents. I have found traders woefully misinformed of the law relating to trade and business. Merchants who are in the habit of giving and accepting bills of exchange are ignorant of the legal requisites for the validity of those documents, and do not know with any accuracy what are the liabilities arising from them. In a still greater degree, men and women who have been householders for years are ignorant of their obligations to the landlord and the landlord's obligations to them. There is not one householder in three who is accurately informed on that everyday matter—the giving and taking of notice to quit. In the same way, mistresses and servants have the haziest ideas of their legal positions towards each other.

There are other matters of everyday occurrence that concern almost everybody, on which all people ought to have accurate ideas, but upon which universal ignorance prevails. Any man, for instance, may be asked by a friend to become an executor or trustee of a will. Yet nineteen people out of twenty, when they accept these offices, have no notion of the duties and legal responsibilities which they undertake. The consequence is that from the highest of motives and with the best possible intentions, they do things which result in enormous trouble and very often considerable expense to themselves. They do not like to be continually consulting a solicitor, heaping up bills of costs to come out of the estate; and, moreover, they frequently have not the slightest doubt that they are doing right,

when, in fact, they are absolutely wrong. Then there is the man who makes his own will or another man's will. He thinks, in the innocence of his heart, that it is the easiest possible thing to make a simple will. I think I shall be able to show the readers of *The Family Lawyer* how carefully any will, however apparently simple, should be made. There is a toast known amongst lawyers which is frequently proposed at festive gatherings of members of the Chancery Bar. It is, "Here's to the man who makes his own will!" The Chancery barrister knows full well that one of his most lucrative sources of income is that gentleman whose health he so cordially drinks.

There is, in fact, as much popular ignorance on the subject of law to-day as there was fifty years ago on the subject of hygiene, or on the subject of chemistry. Instruction in the Board Schools has done something to remedy this lack of general and scientific knowledge, and popular literature on those subjects has also done much. Most people know nowadays that defective drains are injurious to health. Fifty years ago no one took any notice of them. If one had the fever, it was put down to a visitation of Providence. And so to-day, if a man is let in for an action-at-law, when he is not conscious of wrong, and is mulct in damages, he blames the mysterious character of the law.

I see no reason why instruction should not be given in schools to elder scholars about the laws of their country. The middle-class youth is taught that Richard the Third was called "Crookback"; that he murdered his nephews in the Tower of London; that he was defeated and slain at Bosworth Field. He is left entirely ignorant of something which would be of far more value to him in after life as a business man, namely, how to make a contract that is valid in law. He is not taught what would be of use to him as a householder—the liability of a landlord to a tenant, and of a tenant to a landlord. Do not imagine that I am for one moment advocating that all children should be trained as lawyers. What I am advocating is that they should be taught such *elementary principles* as must be useful for everyone to know. Such a study would not only be of great practical utility in after-life, but it would be of equal present value as a mental training. In default, however, of such early instruction, men must continue to grow up in their present state of abysmal ignorance. They must do as they have always done hitherto—that is, act in a blundering sort of way without any knowledge of principles to guide them; and, finally, when they have brought themselves and their affairs into a state of muddle, go to their solicitor and inquire how they stand.

It is my purpose and intention in this book to inform all classes of the community in England and Scotland of those legal principles that ought to guide and govern them in the common transactions of their everyday life.

With criminal law I have no concern, partly because it would make this book too long to go into that subject fully, but chiefly because I do not consider that disquisitions on murder, manslaughter, burglary, housebreaking, false pretences, theft, and so on, would be of the slightest use to the average man. And it is for the average man that I write. There are some cases, however, in which certain acts or omissions have been made penal by Act of Parliament, which do concern the ordinarily well-conducted householder and family man. I refer, for instance, to such offences as creating a nuisance injurious to health, neglecting to disinfect



an infected house, letting unhealthy lodgings—all of which may in certain circumstances subject the offender to pains and penalties. Such matters as these I shall deal with.

It will now be useful to give in tabulated form a bird's-eye view of the scope of this work :—

## I. THE LAW OF THE FAMILY MAN.

1. HUSBAND AND WIFE.
2. PARENT AND CHILD.
3. GUARDIAN AND WARD, AND WARDS OF COURT.
4. MISTRESS AND MAID.
5. LIFE INSURANCE.

## II. THE LAW OF THE HOUSEHOLDER.

1. THE HOUSEHOLDER AND HIS LANDLORD.
2. THE HOUSEHOLDER AND HIS NEIGHBOUR.
3. THE HOUSEHOLDER AND THE CONDITION OF THE HOUSE.  
Drains and Sanitation.  
Dangerous Structures.
4. THE HOUSEHOLDER AND HIS RATES.
5. THE HOUSEHOLDER AND HIS LODGER.
6. THE HOUSEHOLDER AND HIS FURNITURE.  
Hire and Purchase Agreements.

## III. THE LAW OF THE BUSINESS MAN.

1. CONTRACTS AND AGREEMENTS GENERALLY.  
When they ought to be in writing, stamp required, contracts with foreigners, etc.
2. BILLS, NOTES, AND CHEQUES.
3. AGENTS.  
Commercial travellers.  
Brokers.  
Mercantile Agents or Factors.  
Auctioneers.  
Foreign Agents and Agents for Foreigners.
4. PARTNERS AND PARTNERSHIP.
5. COMPANIES.
6. THE SHOPKEEPER.  
The Sale of Goods.  
Credit.  
Shop Assistants.  
Receipts for money paid.

7. THE MANUFACTURER.  
Factory and Workshops Acts.
8. THE MERCHANT.  
Bills of Lading, etc.
9. THE FARMER AND MARKET-GARDENER  
Agricultural Holdings Act, etc.
10. THE WORKMAN.  
Employers' Liability.  
Friendly Societies.  
Piecework.  
Trades Unions, Strikes and Lock-outs.
11. THE CARRIER.  
Carriage of Goods.  
Carriage of Passengers and their luggage.  
Cloak-rooms.

#### IV. THE LAW OF THE BORROWER AND LENDER.

1. MORTGAGES.
2. BILLS OF SALE.
3. PAWNING.
4. GUARANTEEING A LOAN.

#### V. INHERITANCES AND TRUSTS.

1. (a) MAKING A WILL (with simple form).  
(b) CANCELLING A WILL.
2. EXECUTORS, their duties and liabilities.
3. DIVISION OF PROPERTY when no will is made.
4. TRUSTEES, their duties and liabilities.
5. MONEY IN CHANCERY.

#### VI. THE LAW OF THE CITIZEN.

1. THE FRANCHISE, Municipal and Parliamentary.
2. VARIOUS PUBLIC OFFICES :—  
Mayor, Town Councillor, Parish Councillor, etc.
3. TAXES.
4. VARIOUS PUBLIC DUTIES.

Book I., chapter i., on Husband and Wife, will be useful to both married partners. It will show the husband how far his wife has power to run him into debt, and, conversely, will show the wife how far she has power to pledge her husband's credit. I expect a considerable amount of surprise on the part of many readers of *The Family Lawyer* when they learn what the law is upon this important subject. The same chapter will also show how far a husband is responsible for the acts



of wrongdoing which his wife commits, and will further deal, though shortly, with the separation of husband and wife, and the dissolution of the marriage tie. Most people, especially those married men whose wives happen to possess a little property, have heard of the Married Women's Property Act ; but the exact bearing of that Act is not, I think, generally known. Especially is there a haziness in the popular mind about the legal liability of a husband for the debts contracted by the wife before they were married.

The next chapter, that on Parent and Child, will endeavour to elucidate the legal rights, duties, and liabilities cast upon fathers, mothers, and children. It will tell you who are parents how far you are liable to maintain your children, and you who are children to what extent you are responsible for your parents' support. I may remark, in passing, that it will be found interesting as well as instructive to compare the English with the Scots law upon this subject. Of late years there has been a tendency to give the maternal parent equal rights over the children with the paternal. It does unfortunately happen that husbands are not always humane in the treatment of their wives, and at one time many women were prevented from leaving brutal husbands by the thought that to leave their tyrant meant to leave the children to his mercy. I shall show in the following pages what the law on this subject is, and how a woman can at once protect both herself and her offspring. Fathers and mothers will also find described the way to secure that their orphans shall be in proper hands when they themselves are dead.

The chapter on Guardian and Ward will, I hope, be found not the least interesting in the book. Wards of Court, or wards in Chancery, as they are sometimes called, have formed a frequent subject of romance. The popular idea is expressed in a somewhat exaggerated form by the Lord Chancellor in *Iolanthe* :—

" Here I sit in court all day,  
Giving agreeable girls away.  
There's one for you and one for ye,  
And one for thou and one for thee,  
And one for him and one for he,  
But never—ah never! a one for me."

I am in hopes that a knowledge of the powers possessed by the Chancery judges over the " agreeable girls " aforesaid may be of use to some aspiring young man who, with designs honourable and matrimonial, seeks the hand of one of them.

Further, under the head of the Law of the Family Man, you see that I intend to talk about domestic servants, for that is the subject of the chapter on Mistress and Maid. It will be necessary to handle this subject delicately. The servant question is a very tender one with many ladies, and as all women, whether of high or low degree, are much addicted to standing on their rights, I shall endeavour to be very careful indeed in telling mistresses what are their rights over their servants, and servants what their mistresses' duties are to them. I hope that this chapter will be read diligently by the family man and his wife. I feel sure that much injustice is done by mistresses to their servants under an entire misapprehension of what their respective rights and duties are. I feel equally sure that mistresses often suffer a great deal of annoyance for the same reason. If I may give a word of advice, both to the kitchen and to the drawing-room, it is this : Let the kitchen be

very careful to read what are the rights of the drawing-room, and let the drawing-room be very careful to find out what are the rights of the kitchen. I am quite convinced that *the trouble caused by standing on your rights* is usually the result of considering your own rights merely, without taking into account the rights of the other side. Mistresses and maids will find discussed such matters as notice to quit ; dismissal without notice—when it is lawful and when not ; characters, and how far a mistress is liable if she gives an undeserved ill-name to a discharged servant.

I shall conclude Book I. with a chapter on Life Insurance. I consider that this mode of providing for a wife and family in case of the unforeseen death of the breadwinner is one that ought fully to engage the attention of the family man. I shall try to show in my remarks upon the subject what is the position of an insurance office to the man who insures, and the position of the man who insures to the insurance office. I shall also explain how it is that life insurance is the safest legal way to make a provision for the family in the sad circumstances of the early death of the husband and father. The family man who reads this chapter will learn something of the different kinds of insurance companies and of the different kinds of insurance policies that are in use, and will no longer invest his money in the dark.

Book II. will treat of subjects of interest to a very large class. Every householder ought to know his obligations to his landlord, and his landlord's obligations to him, his legal liabilities as to drains and the sanitation of his house, and upon what scale he ought to pay rates. If he lets part of his house to lodgers, it will be instructive for him to read how he ought to let his lodgings, and in what way he can enforce the payment of his rent. This chapter on the Householder and his Lodger will be as useful to the lodger as to the householder.

I take it also that every householder will be interested in the subject of the Householder and his Neighbour. "*The man next door*" is, I believe, a source of considerable vexation of spirit to a great number of citizens. In the days of long ago, when every house, almost, stood in its own ground, the vagaries of the neighbour did not affect the average householder very much, but in these days, when houses are huddled close together in the towns and cities, and even sometimes in the country districts, it makes a great deal of difference to the man who lives at Number 3, Harmony Row, if his neighbours at Numbers 2 and 4 conduct themselves riotously. Neighbours' quarrels are proverbial. Sometimes they arise out of sheer bad temper, but very often they are generated by erroneous notions of one's legal position. Jones thinks that he has a right to do what he likes in his own house. Smith thinks that Jones's first duty is not to annoy his neighbour. I shall endeavour in my treatment of the subject to show what are the legal rights of both sides. I hope that this may be the means of removing a great deal of misconception on a variety of points of everyday occurrence. How many people, for instance, know what is their legal position if a neighbour's hen flies over the fence and scratches up the flower garden ? I need hardly say that the law *does* provide a remedy for this state of things, but what that remedy is, is hardly known to one person in a thousand. Yet it is quite a common grievance, and must occur every day.

The chapter on Landlord and Tenant, or the Householder and his Landlord, I



have made very full, because I well know the importance of this subject. There is, perhaps, no relation in the life of the average man in which so many legal questions arise as between the householder and his landlord, and I shall be very careful to tell you as plainly as I can what the rights and duties on both sides are. In the old days, before the modern commercial spirit had arisen, the relations of landlord and tenant were far different from what they are to-day. There was a personal bond between them : the tenant was bound to follow his landlord and assist him in all his quarrels, and in return there was a moral duty on the landlord's part to protect the tenant against all comers. In those days, agricultural tenancies were generally for the life of the tenant, and although the farm was not, in law, a hereditary possession, yet, in fact, it was. No self-respecting landlord would have dreamed in those days of doing anything else, when his tenant died, but let to the tenant's eldest son for his life ; and the eldest son would have considered it passing strange if anyone else had suggested that he should do other than take the land that his father had held. With houses in town the position was never quite the same. There never was the same relation of mutual assistance between the *townsman* and his landlord as there was between the *farmer* and his superior. At the same time, even the urban landlord considered the bond between himself and his tenant something more than a mere business contract. All this has now changed. The tenant, in a great majority of cases, never sees the landlord at all, for all the business is done through an agent, or factor. The landlord does not know anything about his tenants personally. Consequently, there cannot possibly be in the relations of a modern householder and his landlord any other spirit than that of strict business and strict legality.

It would have been almost unnecessary in a book of this kind, had it been written 150 years ago, to deal at any great length with this part of the law. But that spirit of strict legality, that want of personal knowledge to which I have alluded, has caused a great number of questions to arise between landlord and tenant in modern times. There is, in fact, no more fruitful source of litigation. Some of this is, no doubt, due to a desire on the part of one side to overreach the other, but a still greater portion of it is due to sheer ignorance. My advice is this : Before you enter into an agreement, at any rate, for any length of time, with a landlord, read the chapter in this book upon the Householder and his Landlord. In it you will find explained most of the ordinary forms of tenancies, and you will thus know precisely what it is you are undertaking when you hire a house in any of these forms. I am the more surprised, the more I think of it, at the confiding, not to say credulous, manner in which the average man will sign an agreement for a tenancy of which he does not really understand one-tenth. A time comes, perhaps, when some demand is made upon him, and he is surprised to find, when he consults his solicitor, that this demand, which seemed so preposterous, is quite legal according to the agreement of tenancy.

Book III., which will deal with the law of the Business Man, ought to be useful to everyone, because *everyone has some business transactions* at some time or other, even though he may not follow any business regularly. If you refer to the plan of the work, you will see that I purpose to deal with the chief *classes* of businesses, and also with the *relations* of different kinds of masters and employees. Besides that, I

shall endeavour to explain those matters which affect practically *every* business transaction of every kind. These will be found more particularly in the first chapter on Agreements or Contracts. It is surprising, on the whole, how very few people know the requisites of a valid legal contract or agreement. What those requisites are can be explained in a very short time, because they depend on quite a few principles, which are easy to be understood and as easy to be explained. I have seen scores of actions—especially in County Courts—fail because of some trifling informality in the contract. It seems to me that every class of trader and business man ought to know thoroughly what are *the legal requisites of those contracts which he has to make every day in his business*. It is very far from being the case. Fortunately, the enormous majority of mankind is passably honest. If it were not so I really do not know how business could be carried on. I see every day contracts that ought to be in writing made by word of mouth—though pen and ink are cheap enough. I see agreements that ought to be stamped in a certain way not stamped at all. Although, as a rule, men do carry out their contracts without regard to the strict letter of the law, yet sometimes disputes arise, and the person who thinks himself aggrieved because the contract has not been carried out finds that he can get no redress because he has not made the agreement in the way that the law requires. I shall try to give business men, in understandable language, an explanation of all the principles that ought to guide them in the ordinary transactions of business life. It has always seemed to me a pity to find a man deprived of his just rights through a mere technicality, and I hope to be able to inform my readers of *the technical things which the law takes notice of*, and to warn them of those pitfalls which experience has shown me lie most commonly in the path of business men.

The next chapter will deal with Limited Companies. These companies are created wholesale nowadays. Hundreds and thousands of people invest their money in them, and I am sorry to say that an exceedingly large proportion of these concerns is by no means honest. The various Companies Acts have endeavoured to check swindling by means of limited companies, but so ignorant are the public of the protection afforded by these statutes that fraudulent company promoters find scores of victims. There are three things that every shareholder in a company ought to know. The first is, how to satisfy himself that the company is *bonâ fide* before he puts his money into it. The second is, how to protect his interest when he has put his money into it. The third is, what are his means of obtaining restitution and the punishment of the swindlers if he finds that he has been duped. These things will be made plain in this work. Another branch of the law relating to companies, which is proper to be brought before the public, relates to the companies and their dealings, not with their own shareholders, but with customers and creditors. Many people are not aware of the fact that dealing with a company is a far different thing from dealing with a private person or a private firm. Let them read the chapter on Companies and they will, I think, find something worth finding. After these chapters on the law relating to business generally, I shall deal with particular classes of persons who engage in business—both employers and employed. Thus there will be a chapter on the Shopkeeper, in which will be explained the law relating to the sale of goods so far as it affects him—credit ; certain classes of



persons to whom it is legally dangerous to give credit ; and, in fact, all those matters of law which experience has shown to be especially applicable to the shopkeeper. The Manufacturer will next be dealt with, and after him the Merchant, who will be told all about Bills of Lading, Consignment Notes, and especially a safe and effectual way of securing payment for his merchandise.

The succeeding chapter will be especially for the benefit of Farmers and Market-gardeners. It will tell the farmer something that a good many of his class do not know, and that is, the legal meaning of the usual covenants in farming leases. It will also explain how farmers and market-gardeners are to take advantage of the Agricultural Holdings Act, and what are the privileges conferred by that much-talked-of, but little understood, statute. This part will also include a chapter on Bills, Promissory Notes, and Cheques ; a chapter on all sorts of Agents, especially commercial travellers, brokers, foreign agents, and auctioneers. I may remark in passing, that agency is a matter that gives rise to a very great number of actions at law, and this is frequently because both the agent and his principal are unacquainted with their lawful rights and duties. The law of agency is not extremely difficult, and it ought to be easy for any business man, when the principles of agency have been explained to him, so to make his contracts with his agents, travellers, etc., as to avoid, not only conflicts with them, but also liabilities to other people. For it very often happens that a merchant finds himself responsible, through the act of his agent, for liabilities which he never contemplated.

Another useful chapter will be that on Partners and Partnership. It is surprising how many people enter into partnership without having any but the very haziest ideas of the liabilities which they undertake. Moreover, it often happens that people become partners without intending to do so. I shall try to show you what are the rights of partners, and their liabilities to each other, and what their liabilities are to the creditors of the firm.

The Workman will next receive attention, and it is proposed to deal with such matters as Employers' Liability, Trades Unions and Friendly Societies, Notice to Leave, Strikes and Lock-outs. Workmen nowadays are so much better educated than their fathers that it is a pity they are frequently deprived of so many things to which they have a perfectly legal right. On the other hand, it is also a pity to find them frequently embarking on a course of conduct with which they would have nothing to do were they acquainted with the law on the subject. I shall also bestow attention upon the law relating to Apprentices, and a chapter on the Carrier will complete Book III.

"Neither a borrower nor a lender be," said the sagacious Polonius to his son Laertes ; and no doubt the advice was most exceeding wise. Whether or not Laertes strictly obeyed his parent we do not know. If he found himself able to do so he was a lucky man. True enough it is that

"Lending oft loses both itself and friend,  
And borrowing dulls the edge of husbandry."

At the same time, there are not many people who can truthfully say that they never borrowed or lent. There are, as we know, professional lenders of money whose advertisements we see daily in the papers. There are also other professional lenders of money recognised by the State and trading at the sign of three golden

balls. In addition there are, every day, vast sums of money lent by way of investment on mortgage. I hope to make the chapters on the Borrower and Lender (Book IV.) not the least interesting and by no means the least instructive in this book. Bills of Sale, Pawning, Mortgage, I. O. U.'s, and all the paraphernalia of borrowing and lending will be duly treated of with intent that all lenders may know how to get the best security for their money, and borrowers may be shown how to prevent lenders, especially professional lenders, from taking advantage of their necessities.

Book V. will be occupied with a subject of considerable interest. Some of us there be who have money to leave, others of us who hope money will be left to us. How to make a will and how to cancel a will and how a will may be cancelled without you knowing it, are points of considerable practical importance. Wills are often made in such circumstances that it is impossible to get legal advice, and I hold it to be the duty of every man to learn how to draw a simple testament, not simply for his own use, but as a duty to the neighbour. Pray understand, I do not advise anyone to make his own will. It is always rather risky, and quarrels innumerable have arisen in families, and bad blood and ill-feeling have been generated through home-made wills. At the same time, when a man is *in extremis* and has not done what every man ought to do as soon as he attains twenty-one, a lawyer is not always to be found, and you have the alternative of a home-made will or no will at all. I shall append to my discourse on Wills a simple form of such document. As I have said before, any man at any time may be requested to perform the duties of an Executor or a Trustee. Many men first accept these responsibilities, and then, after finding out what they are expected to do, endeavour to back out of their engagement. It will be a valuable service to explain what the duties and liabilities of executors and trustees are, so that if you are asked to become an executor or trustee for a friend, you will know pretty well what it is you undertake if you do consent.

Then there is to be considered *the division of property when no will is made*, and also that question which is commonly called "Money in Chancery," about which we often hear, and about which nobody knows very much. There are many people in Great Britain, usually considered sane by their friends and relations, who pay considerable sums of money in trying to find out whether there is some money in Chancery belonging to them. If these persons will look at the section of this work dealing with Inheritances and Trusts, they will find out how to discover money in Chancery and how to get it out. They may also, perchance, find what simpletons they have been to pay those fees to inquiry agents.

Finally, in Book VI. I shall speak of the Law of the Citizen—not, of course, from any political standpoint, but from a purely legal aspect. It will be useful for everybody to know something about the law of the Franchise, what are the qualifications for a municipal or Parliamentary vote, and how to claim such a vote. The law of Elections will also occupy some little time and consideration. There are many people who now take part in elections who frequently jeopardise the chances of the candidate whom they support by the most indiscreet conduct. And I suppose everybody will have seen, occasionally, in the newspapers after an election has taken place, whether for Parliament, County Council, or Parish



Council, applications on the part of candidates to be relieved of some entirely unintentional infringement of the election law. Now, as any citizen may at any time be called upon to stand for a vacancy, either in the Imperial or Local Parliament, it will be advantageous to put before the public a clear and concise exposition of those things which the law requires, and of those things which it forbids.

A further piece of information will be a chapter about Taxes. I hear continued complaints from people who imagine that they are paying too much into the Queen's Exchequer. This more especially applies to Income Tax. It is common to find tax-payers with the most hazy ideas as to what *deductions* they are entitled to claim from their gross income. I venture to hope that my chapter on Taxes will make this matter plain.

Then, last of all, I shall place before my readers a compendium of various Public Duties and Public Rights. Since the creation of Parish Councils, these bodies have occupied themselves a great deal with questions concerning public rights of way and rights of common. It is a good thing that there is now in every parish a body with power to protect the public interest in these matters. At the same time, I think it will be generally agreed that very few people really know the proper basis of a claim for a public right of way, and I know more than one Parish Council in which the ratepayers have been put to needless expense on account of baseless claims having been made on their behalf. It will be my endeavour to show how the law assists a claim for a right of way and to explode certain fallacies on the subject. Besides the rights of citizens, there are a good many public duties of which all need be informed. Amongst these are the duties of serving in some public offices if called upon; to assist the police in certain circumstances, and to refrain from taking part in riotous assemblies.

Before I conclude these introductory remarks, let me reiterate what I have said, that this book is not written to promote, but rather to check litigation. I have found that litigation arises, as a rule, or at least very often, because people who enter into agreements and business relations are mutually ignorant of what the consequences are. The result is that one party by and by alleges that the agreement means this, and the other that it means something different. This will be found to apply very frequently indeed in leases and other agreements between landlord and tenant. People very often get hold of phrases commonly used by lawyers and apply them to circumstances entirely foreign to their real meaning. It will be no inconsiderable part of my duty, as the Family Lawyer, to *point out very many things that are not law*, as well as a great many things that are. In fact, I do not know whether the former information will not be just as useful as the latter. Men frequently imagine a great deal of law, and their mis-information is far more dangerous than no information at all. It will be necessary for laymen who read this book to read it with an open mind and not to start with preconceived opinions.

Let me give another piece of advice, written by a far mightier pen than mine in the early part of this century. You remember the genial advocate in *Guy Mannering* who, speaking of one who had attempted to use the law to benefit himself at the expense of others, says :—

"Law is like laudanum ; 'tis much more easy to use it as a quack does than to learn to apply it like a physician."

The way to apply law like a physician is to use it for the purpose of ascertaining what steps ought to be taken in order to bring a contemplated act under legal protection. To use it like a quack is to try to twist it into a means of injustice to the neighbour. What I want to effect by means of this book, is to place within the comprehension of the non-legal mind the rules of law by which conduct ought to be regulated, and to give to my readers knowledge sufficient to prevent them from being made the prey of the unscrupulous and the designing. In addition to this, I aim at placing within the reach of everybody a readable book on an important subject which meets us all every day of our lives.





## Book I.

### THE LAW OF THE FAMILY MAN.

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#### CHAPTER I.

##### HUSBAND AND WIFE.

A bit of ancient history—Pledging the husband's credit—Advertisements not to be responsible for wife's debts—Husband must support his wife—Husband refusing to live with wife—The tally-man—Pledging the wife's credit—The wife's property—The danger of a wife lending money to her husband—The wife's furniture—Marrying the wife's debts—The wife's wrongdoing and the husband's liability—The wife who goes to law—Can married people make presents to one another?—"Robbing themselves out of love"—Mrs. Dives' diamonds—Gifts before marriage—Compelling a wife to live with him—The right(!) to beat a wife—The right to each other's society—The wife's rights in her husband's property—Wills must be made after marriage—Advice to married men about wills—Husband's interests in the wife's property—Divorce—Separation orders.

**W**OMEN'S rights, women's wrongs, the position of the wife in the household, have all formed the subjects of torrents of speeches and avalanches of volumes, so that it is almost a truism to say that the relations of husband and wife are complicated enough from a social point of view.

*The Family Lawyer*, being naturally cautious, will avoid these thorny subjects, and will discuss the question of the legal relations of husband and wife—a problem quite as complicated and quite as interesting to the family man as the social problem.

A bit of ancient history might prove both interesting and instructive. In most of the primitive systems of law with which we are acquainted, the wife occupied a very low legal station. She was regarded simply and solely as her husband's property. No doubt there were reasons for this state of affairs. For one thing, in a primitive state, force is the greatest attribute in the popular mind—the strongest man of the tribe is the most respected; and as women were naturally of little use as fighting material, they came to be looked on as not of much account. It was, in fact, the custom among many tribes to kill all the girl-children except one in each family, on the same principle that deformed males were also killed in infancy—namely, because of their uselessness in war.

How, then, did the men get wives? Well, in two ways. Amongst many tribes, the custom of polyandry prevailed; that is, a woman married the eldest son of a family, and as each of the other sons grew up, he took the woman to wife also: so that a woman not only had one husband, but several. In Tibet to this



day polyandry prevails, and all the brothers marry their eldest brother's wife. Another primitive way of getting a wife was by capture in war. A tribe whose young men were growing up and unable to find wives amongst themselves, made war on another tribe, killed or drove away the men, and captured and afterwards married the women.

In due course of time, men began to settle down, and female children became less of an encumbrance than they were when the tribe simply wandered over the earth. Warfare, too, began to be regarded as more serious, and as harmful even to the victors. Wherefore, the supply of women became more plentiful, and we find the principle of monogamy—that is, one man one wife—established in Europe, and polygamy, the very opposite to polyandry, making head in the East. The cruel mode of capture gave way to the rather more humane one of purchase—a method still practised over a large part of the globe, for it is a recognised custom throughout Africa and a great part of Asia.

It is worthy of notice that in Europe the legal position of the wife has always been more advantageous than amongst Eastern nations. By the Hindû law and by the law of China, even to-day a wife is in no better a position in the eye of the law than she was 2,000 years ago. And in the West, too, until the Christian era, the legal position of the married woman was not very beneficial to her. That ancient system of law which embodies so much wisdom, and at the same time forms a link between the old and the new—the Roman—gives us a good notion of the wife's legal position in a primitive society, and its gradual improvement. I would have you remember that in no primitive state was the married woman held in so much honour and esteem as she was in the little Roman Republic of 2,500 years ago. "The Roman matron" is, even to-day, a synonym for high-minded virtue and lofty patriotism. She occupied, and deservedly occupied, a high social position, and yet, in the eye of the law, she was nobody. She was said to be "in the hand of her husband." He could lock her up, he could put her on the shortest of diet, and compel her to wear the coarsest of garments. He could even beat her if she drank wine, or gossiped about his affairs, or scolded him; though politeness and custom demanded that, before flogging her, he should summon her relations together and tell them what he proposed to do, and why he proposed to do it. She had no legal will of her own—in fact, so completely was she lost in the husband, that if she received any injury she had no legal remedy: it was the head of the family who brought an action against the aggressor. As to having any property of her own, the idea never entered the married woman's head. The Law of Manû, which is looked upon as sacred and unalterable legislation by the teeming millions of Hindûs, declares: "There are three persons—a wife, a son, and a slave—who have no property of their own. All their earnings go to the man to whom they belong."

In India the religion has not altered to this day, and if British rule were removed, the Law of Manû would again become of full force and effect, because it is part of the people's religion. In Rome, however, the married woman got her separate property comparatively early, for we read that not long after the year 1, A.D., the custom of passing a woman "into the hand" of her husband ceased. The reason was very simple. The women would not stand it; and when woman

makes up her individual and collective mind on any subject whatever, she generally carries her point. The new custom was for the wife, or her relatives, to give property to the husband by way of dowry, to enable him to meet the extra expenses of married life. The husband might use this property, or invest it, but he could not destroy it, nor spend the capital. When the marriage came to an end, by the death of either party, or by divorce, he was obliged to hand over the same property, or its value in money, to the wife or her relatives who originally gave it.

There is a rule to the same effect in Scotland to this day, except that if a wife is divorced for misconduct she does not get back any of her "tocher," as the wedding-gift is called. But the Scottish rule was that whatever the wife earned or acquired after she was married, belonged to her.

In England and the Scottish Lowlands, where the people are practically of the same race, woman was always from the earliest time, man's helpmeet. Yet a wife had very few legal rights; and what she had could only be enforced by her husband. On the other hand, she had few liabilities—none, in fact, so long as she did not commit crime. She was far better off than her early Roman sister in one respect—her husband had no legal right to beat her, or to starve her. If there have been husbands who have starved or thrashed their wives, it has never been the fault either of the Scots or the English law.

After this glimpse of the past, let me come to the present. One of the most important practical questions, and one of the most constantly recurring, is the question of the wife's power of

**Pledging the husband's credit.**—The young married man ought to start well. His wife will, no doubt, be manager of the household affairs. She will order the groceries, the butcher's meat, and all the other necessary provisions. She will purchase clothing for herself and the children, and so on.

Now as everybody knows, many a hard-working man has been ruined by his wife's thoughtless extravagance. Let me tell you how to avoid this.

#### IN ENGLAND.

It is a mistake to suppose that a husband is responsible for his wife's debts. He is not—unless he has in some way allowed her to pledge his credit. He can do this in several ways :—

(1.) **By telling her straight out to buy things on his credit.** He is then liable for all she does so buy.

(2.) **By paying for things she has bought on credit.** This is regarded by a judge as equivalent to a promise to the tradesman to pay future bills as well. Therefore, if a husband does pay one bill run up without his knowledge or permission, he should *forbid his wife to do it again, and tell the tradesman not to give her credit in the future.*

(3.) **By deserting his wife,** and leaving her without money for food, clothing, and lodgings for herself and the children. If he does this, she may obtain these things on credit, and the husband will have to pay. The law is the same in Scotland.



Advertisements frequently appear in the newspapers like this: "I, John Smith, of 20, High Street, Little Peddlington, hereby give notice that I will not be responsible for any debts contracted by my wife, Mary Smith." *Notices of this kind are not worth the paper they are written on.* If Mr. Smith wants to give notice to tradesmen, he should, as I have stated, *tell each one individually* not to give credit to Mrs. Smith. He is not obliged to give any notice at all to people with whom he has never dealt. But if he has once paid the grocer (for instance) a debt contracted by his wife, the grocer may go on trusting the wife until the husband tells him not to do so any more.

A husband can, therefore, protect himself quite easily. "The best thing to do is, when it is at all possible, to make the wife a regular allowance for housekeeping and clothing, and ask her not to buy anything on credit. If she disregards such a reasonable request, the husband will not be liable for one sixpence of the debts she incurs.

But one more word of caution. If a bill is sent in for a debt such as I have indicated, or a letter be sent asking for the money, do not treat it with silent contempt.

Many people, when an unjust claim is made on them, take no notice of it. This is foolish, because if the case ever gets into court, the lawyer on the other side will say something like this: "My client sent in the bill four times, and the defendant never objected. In fact, he never objected at all until we sued him." And a very right and proper remark it will be. There was once an Irishman who received an abusive letter demanding a debt. He returned it with the following note: "Sir, I return your scurrilous missive unopened; and I beg to say that I treat it with silent contempt." Albeit this Hibernian expressed himself in terms somewhat peculiar, his letter, there can be no doubt, was better than not answering the demand at all.

#### IN SCOTLAND

**a wife has, what she has not in England, the right to buy necessary things for the household** on her husband's credit. Nor does it matter, as it does on the south side of the Border, whether he forbids her to do so or not, or whether he makes her an allowance for housekeeping or not.

Still the Scots law finds a way for the husband to protect himself against his wife's extravagance. (1) He can forbid any particular tradesman to give her credit. (2) He can apply to the Court of Session for an "inhibition," by which all persons whatsoever are prohibited from supplying her with goods and charging them to her husband.

But if he does either of these two things the husband must give his wife an allowance, sufficient to supply her with decent food, clothing, and such-like articles, or else he must buy them for her himself. It would hardly be fair to the woman to prohibit her from getting things on credit and then not to supply her with ready money. So if the husband fails to provide her with support, she can, like her English sister, provide them on his credit. As I have indicated,

#### IN ENGLAND

**a husband must support his wife.** If he does not, and she has to apply for parish relief, the Guardians of the Poor will summon him before the magistrate,

and the magistrate will make an order on him to pay so much a week, according to his income. Or if the husband does not support his wife according to his means and ability, she can leave him ; and, as I have said before, get for herself, on credit, food and clothing, and the other necessities of life, according to her husband's means and position. The various tradesmen from whom she buys these things can then make the husband pay for them.

I once knew a man with an income of £800 a year who turned his wife out of doors. The lady had no means of living, so she went to various tradesmen and ordered meat, groceries, a clock, and a silk dress, and told the shopkeepers to send the bills to her husband. They did so, and the husband had to pay. She also went to a solicitor for advice as to what she should do to remedy her painful condition, and the husband had to pay that solicitor's bill also, though it was for advice against himself. This was because the food, the clock, the dress, and the legal advice were all necessities for the wife, according to her husband's station. Of course, if the lady had been the wife of a man earning only £3 or £4 a week, she would not have been entitled to order silk dresses and clocks, because these would not be necessities, according to the position of the husband.

**If a husband refuses to live with his wife, or by his cruelty and misconduct forces her to leave him,** she can claim an allowance, according to his means. And if he refuses to make such an allowance, she can then buy necessities on his credit. But her best plan is to go to the nearest magistrate's court and take out a summons against him. When the summons is heard, if she can prove that he has been cruel to her, or has committed adultery, the magistrate can make an order on him to pay anything up to £2 a week. (*See p. 42.*)

**The tallyman, "Scotch draper," or packman.**—There is a person called the tallyman in the South of England, and the "Scotch draper" in the North, and the packman in Scotland, about whom I wish to say a word or two, that word or two being by way of advice to working men. The tallyman is a kind of pedlar, or hawker, who goes about from door to door of the houses occupied by workmen and their families. He sells such things as dresses, dress material, ribbons, laces, jewellery, and ornaments both for the female form divine and for the house. Now the trouble of it is that he gives credit. In fact, it is his business to give credit to his customers. I will show you how it pays him far better to sell on credit than for ready money. His *modus operandi* is this : one day Mrs. Blank, the wife of a decent labourer or mechanic, hears a knock at the door, and, on answering the summons, she finds on the threshold a gentlemanly-looking man who carries a parcel or two. He inquires if he has the pleasure of addressing Mrs. Blank, and on being assured that he has, he states that he has called on business. May he come in ? "Oh, certainly, sir." And in he comes, parcels and all.

Said parcels he rapidly unpacks, and displays to Mrs. Blank's ravished vision silks and satins, serges and cashmeres, besides prints and cottons, the patterns whereof look as if they could talk an they would. When the tallyman sees that the mistress of the house is lost in admiration, he begins to descant on the wonderful quality and cheapness of his wares.

"This silk," he says casually, "is only four-and-six the yard, madam—the



identical piece from which the Duchess of Dampshire had a dress made last week. This is the remnant. I picked it up cheap." The fact being that the same silk could be bought in a shop at half-a-crown a yard. "Sold a piece somewhat similar to Mrs. O'Dash" (the next-door neighbour of Mrs. Blank), "but not really so good as this—hadn't the same finish."

If ever Mrs. Blank felt inclined to buy a dress length, it is now. Silk, poor woman! her husband cannot afford to pay for. And so, with a sigh, she says, "Not to-day." Then the tallyman, knowing from experience what the difficulty is, plays his cards accordingly. "Lovely piece of stuff. Eh, Mrs. Blank?" Mrs. Blank ruefully assents. "I'm sorry you won't deal with me to-day." Here he begins to strap up his parcel. Then quickly, as though it is a sudden resolution—the guileful trader has made up his mind about it before he came into the house—"I'll tell you what, madam; you can have this remnant for fifty shillings—thirteen yards of lovely silk—and pay me two shillings a week. You are an honest woman, Mrs. Blank, I can see that"—the lady is visibly flattered—"and I'll trust you."

Then Mrs. Blank succumbs and buys the silk, and the tallyman calls every week for his money, and receives it cheerfully as it is given. But one week poor Blank is out of work, or one of the children is ill, and so the two shillings are not forthcoming. Does the tallyman complain at that? Not at all. He duly sympathises with his customer in her troubles, and sells her a few more shillings' worth of his expensive stuff. And so the thing goes on, the misguided woman getting deeper into debt until she has reached the end of her tether. The tallyman has made inquiries. He knows Blank's wages to a penny, and his frequent visits to the house have shown him how much the furniture is worth. The next thing is a County Court summons—not against the wife, but against the husband.

Here the reader objects: "I thought you said the wife couldn't make the husband liable for her debts unless he gave her authority." Quite so. That is the law, and no one knows it better than our tallyman. He knows not only the law, but human nature. He knows well enough that Mr. Blank has never been told about his wife's dealing with the tallyman. All the same he takes out a County Court summons against the husband, because it is from the husband he intends to wring the money.

The officer of the County Court leaves the summons at the house of poor unconscious Mr. Blank, whose wife generally takes it in, and, terrified lest her husband should hear of her extravagance, promptly hides it, or, perhaps, burns it. The case duly comes on at the County Court, James Blank's name is thrice called out by the usher; but no James Blank appears, and the tallyman, swearing that the debt is still due, recovers judgment. Then, for the first time, James Blank hears about it. And he hears in a most unpleasant manner, for on returning from his work some day, he finds a County Court bailiff in possession of his little home.

"What is this for?" says the poor man. "There must be a mistake. I don't owe anybody a penny, to my knowledge. What? William Talleman, Draper? I never heard of him." And then he turns to his wife, and she has to explain that her folly is the cause of the disaster. The debt and costs may amount to more

than five or six pounds ; but they might as well be five or six hundred—and the hard-working man sits down and sees the “sticks” he bought with his savings carried off, and his home ruined.

I have drawn no fancy picture. Not a word is there here for which I have not the warrant of personal experience. Having described the evil, now let me prescribe the remedy. Mr. Blank ought to go at once to the County Court and tell the judge the whole story. Tell him that these goods were ordered secretly by his wife ; that she had no authority to get them on credit ; that the summons never came to his knowledge—and, in fact, relate all the circumstances. Then let him ask the judge for a new trial. He ought in such a case to grant one. This means that the case will be tried over again, and Blank will have to appear and defend. I advise that worthy man to go to a solicitor—a young solicitor would not charge much for such a case—and have it properly fought out. I once assisted in a case of the kind, where the working man in question was befriended by a clergyman who paid the lawyer's fees ; and a little cross-examination of the tallyman resulted in that ingenious gentleman being deprived of the fruit of his industry, and having to pay all the expenses of my client.

It may appear from the foregoing that I brand all tallymen as rogues. Far from it. Many are upright and honourable traders, who never deal with wives of working men on the sly and underhand system that I have described. But it is my duty to caution the unwary against the less scrupulous merchants whose sharp practices tend to bring the business into disrepute.

**Pledging the wife's credit.**—A husband has no power to pledge his wife's credit merely because she is his wife, so that he has less claim on her than she has on him. He can never in any circumstances, unless she tells him to do so, buy anything and make her pay for it.

**The wife is liable to support her husband** if he is destitute and she has more than enough to keep herself. The Married Women's Property Acts gave the wife her property and her earnings free from her husband's control ; but it was recognised, as Thomas Drummond once put it, that “property had its duties, as well its rights.” Therefore, the wife was put under the same liabilities to support the husband that he was under to support her—except, only, that he cannot procure necessities on her credit. If he is destitute and she is well-to-do, and she refuses to feed, clothe and lodge him, he can make a complaint to the Poor-law Guardians, and these latter will make her give him an allowance.

**The wife's property.**—In England, in the “good old days,” a husband could say to his wife : “What is yours is mine, and what is mine is my own.” But the Married Women's Property Act of 1882 changed all that. Nowadays, whatever a married woman earns, or whatever is left to her or given to her, is her own absolutely ; and it has been the same in Scotland since 1881. If the husband interferes with it, she can bring an action against him just as if he were a stranger. She can make a will and leave her husband nothing. She can make contracts ; but if she does, the husband is not bound by them. Her creditors must look to her alone.

IN SCOTLAND, the wife cannot dispose of her property quite as freely. All the income of any property and any money that she earns are hers to do as she likes



with. But she cannot sell or pawn it, or give away the income before it becomes due, without the husband's consent. To take an illustration—if the wife has a sum of £500 left to her by her father. The income of this at 4 per cent. will be £20 a year. Suppose this is payable half-yearly, on the 1st of January and the 1st of July. She cannot go on the 25th of June and borrow £5 on condition that the lender shall be repaid by the trustees on the 1st of July, when her £10 will become due. But when she receives the £10 on the 1st of July, she can do what she likes with it.

There is one exception to this rule, and that is in the case of lands and houses, and *money which is derived from lands and houses*. Property of this kind is called heritable property; and it is to be noted that in some cases a wife cannot dispose of her heritable property without her husband's consent.

This rule depends on the fact that a Scottish married woman cannot make a "deed" without her husband's consent: and a "deed" is the only way that she can transfer heritable property when she wants either to sell it, or give it away, or exchange it for something else.

A "deed" is a legal writing which has to be drawn up in a particular form. I do not intend to try to tell you how to draw up a deed, simply because if I did you would not be able to make anything of it. You know the old farmer's objection to claret—"You don't seem to get any forrarder on it"; and it is the same in the matter of drawing deeds. It is the most difficult part of a lawyer's professional work, and takes years and years of practice to learn even passably well; and by no amount of explanation would you get "any forrarder."

**Loans by wife to husband.**—A wife ought to be careful about lending money to her husband *if he is a trader*. (But, note, that in SCOTLAND the law makes no such distinction.) She *may* lend, and she is quite safe so long as he is solvent. But a husband who is a trader may, through misfortunes, or rashness, or bad management, become a bankrupt, and in that case the wife will get nothing at all until every one of his other creditors has been paid 20s. in the £. This generally means that she will lose all the money she lent him. I have never known a case where a wife has received a penny back in the circumstances.

But take notice, the warning only applies when the husband is a trader on his own account—as, for instance, a shopkeeper, a merchant, a builder, or anything of that kind. If he is a professional man, or a man of no occupation, or even if he is engaged in trade, so long as he is in the employment of some master, the wife who lends to her husband runs no more risk than anybody else.

Just another word of advice, however. Judges and juries are apt to look very suspiciously at claims set up by a wife for money lent to her husband, so that it is always advisable for such loans to be made in such a manner as to leave no doubt of their good faith. I have heard it said by judges, "This lady says she lent the money to her husband. The only evidence of that is her word and his word. There is no other evidence. I am bound to look carefully into these claims, and I am not satisfied that this one is *bonâ fide*." As the result of not a little experience, I advise husbands and wives who borrow and lend to put it down in writing, and to take someone into their confidence. If the wife has a banking-account, let her pay by cheque—then there will be some record. If the amount

is large, let her go to a solicitor and get him to draw up a paper as evidence. If she neglects these precautions, she will stand a very good chance, if her rights have to be decided by a judge, of hearing him say that he is "not satisfied."

**The wife's furniture.**—It happens not seldom that the wife has money and the husband has none, and in such a case the lady will furnish the house. I have known this to be done very often; and I have also known the husband to run into debt, and one fine morning a bailiff has walked into the house and seized all the wife's goods and chattels. Then the wife has made a claim for the goods, and a County Court judge has tried the case to find out whether the furniture was hers or not. And he has more frequently decided against her than for her.

You naturally ask, Why is this? The answer is short enough. It is because, in the first place, when a man and wife are living together, the furniture in their house is supposed to belong to the husband. It is for the wife to prove that it is hers. In a case of this kind not very long ago, the wife claimed all the furniture, saying it was hers. She had £500 when she was married, and the husband had nothing except about £5 at his bank. She handed him over the whole £500, and then they went to the furniture shops, bought furniture, and the husband paid for it by cheques on his banking-account. The bills were made out to "Mr. Nihil." I need hardly say, perhaps, that the husband's creditors took all the furniture, and the wife kept nothing. What she ought to have done was this:—She ought to have kept the money in a bank in her own name. And, above all, she ought to have had the bills made out to "Mrs. Nihil."

When the wife pays for the furniture, unless she intends to make it liable for her husband's debts, she ought to *pay for it herself personally, have the bills and receipts made out to her, and keep these bills and receipts*. If she omits these precautions, she runs a heavy risk of losing what she has bought.

**Marrying the wife's debts.**—It sounds strange, does it not, to talk of "marrying the wife's debts"? Yet such a thing existed once.

*Before the Married Woman's Property Act, 1882*, a husband and wife were one, and the husband was that one. Consequently, if the bride owed anything to anybody before she was married, the unfortunate husband had to pay the piper. He had taken her "for better or for worse," and this was the "worse." I have read of women who in years gone by got rid of all their debts by marrying bankrupts imprisoned in the Fleet Prison for debt. These men were in nowise particular. They knew they were in for life or thereabouts. They knew they already owed far more than they could pay, and it did not make one atom of difference to them that they owed a few hundreds or a few thousands more. The "wife" paid the "husband" a pound or two for the protection of his name, and thenceforth could snap her fingers in her creditors' faces, and gaily accumulate more debts. But now that imprisonment for debts has been abolished, except to a slight extent—to which your attention will be more particularly directed in dealing with the Law of the Trader—this farce has ceased to be played.

In these days the horror of marrying his fair one's debts need not weigh too heavily on the mind of any bachelor who is contemplating matrimony. He will only be liable to the extent of the property which his wife brings him: that is to say, if the lady, while yet single, owes £1,000, and she brings to her husband a



little fortune of, say, £500, he will have to pay her creditors to the tune of £500, but no more. It is just the same in Scotland.

**The wife's wrongdoings.**—It is an anomalous state of things, it is so absurd on the face of it, that we are almost tempted to say with Mr. Bumble, "The law is a hass." You have a wife, at the present time, whose property is her own; she can do pretty much as she likes with it, provided she does not violate her wifely vows to the extent of sullyng her own and her husband's honour. Yet, if she does anything wrong, her husband, if he lives in England, will have to pay.

Take this case, for instance: A married woman owns a horse and trap. It is, indeed, as children say, her "very own." Her husband cannot so much as touch it without her leave. If he, poor man! takes a surreptitious drive, his wife can make him pay damages as a trespasser. She can go out in her chariot when she likes, and with whom she likes, and as far as she likes, and her better-half has not, in law, one word to say.

But suppose she is a bad whip, or a reckless driver. She runs into another carriage, smashes it to pieces, and half kills the driver of it. Then it is that the husband agrees with Mr. Bumble, for the owner of the broken vehicle can bring an action for damages, not only against the wife, who did all the mischief, but also against the husband who sat at home in his armchair quite powerless to stop her wild career. The injured driver can also bring an action against the husband of the reckless lady, as well as against the lady herself.

SCOTS LAW is rather more favourable to 'the man, for in Scotland a husband is not liable for any wrongs (*delicts*) committed by his wife. So that in Scotland the driver and the owner of the broken vehicle would have to take their chance of bringing an action against the wife. Should you ever be in the unfortunate position of having your person or your property damaged by a married woman, whether north or south of the Tweed, remember that in either country you can sue the fair lady herself; but only in England can you obtain satisfaction from her husband.

**The wife who goes to law.**—Before 1882 no married woman could bring an action (except one against her husband for divorce). England was not the only country where this law prevailed. It was current in almost every State of Europe (including Scotland), and descends to the British, not from their old Saxon ancestors, but from the Roman Law which was introduced into England from France by the clergy, and into Scotland from Holland by the early reformers of the Kirk. When we look at the origin of this singular provision, we shall not be surprised at it. As I have indicated (p. 18), the ancient Romans bought their wives very much as they bought their beasts of burden. They could divorce them when they chose, for anything or nothing.

When women were in a state of semi-slavery like this, it was little wonder that they were not allowed to bring actions in the Courts. If anyone injured the wife, it was the husband who pursued him before the Courts. And when the law of Rome was introduced into England and Scotland, partly by the clergy, partly by the scholars, they adopted the old Roman theory—that a wife is swallowed up in her husband, and must look to him to vindicate her rights.

IN SCOTLAND the law is the same to-day—with a difference. If a wife wants to

bring any action to protect herself in her person, reputation, or property, she ought to get her husband to join with her. He can do this with safety, because he will not be liable to pay the expenses. He merely lends his name to give a "tone" to the proceedings. But what if he refuse to lend it? Why, then the wife must go on without it, and ask the Court of Session, or the sheriff who tries the case, to dispense with the name of her protector. The dispensation will generally be granted when the husband has objected with good reason.

IN ENGLAND a wife can now bring an action entirely on her own account, whether her husband likes it or not. There are one or two ladies who make use of their privilege to the uttermost. They haunt the courts and worry the judges. Most of them, relying, one supposes, on their powers of persuasion, conduct their own cases, to the mingled amusement and annoyance of their lordships. It is hardly necessary to say that no one of these litigious ladies has ever been known to win anything. The reason is apparent. Legal procedure is so highly technical that it requires years of study and practice; and I advise no one to conduct his own case, unless, of course, it is merely the recovery of some simple debt in the County Court or Small Debts Court. It is true, as the old wheeze puts it, that the man who is his own lawyer has a fool for his client. The framers of this wise maxim hardly dreamt, perhaps, of the litigious female, or they would have included her in some greater condemnation.

**"Keep out of my house!"** This is what an English lady said to her husband one fine day when he ventured to intrude into her home. The house was hers. She paid the rent, rates and taxes, and she had told her husband she didn't want him any more. But he longed for her society, and he went so far as to walk into her domicile without knocking. Then she ordered him out, and, as he would not go, had him turned out by the servants. Moreover, she brought an action against him for trespass, and he had to pay damages and was forbidden by the Court to do it again. Needless to say, this occurred after the Married Women's Property Act.

In Scotland this could not have happened, for in that happy country a husband, however downtrodden, has the right to go wherever his wife goes. If she has a house of her own, he is entitled to live in it, though no doubt, if she has a will of her own (and I have heard of such cases) he will not be excessively comfortable.

**Can married people make presents to each other?** In England the answer will generally be "Yes." In Scotland, I would say, "As a rule, No," but with a qualification.

IN ENGLAND when a man makes a gift to his wife, or a wife to her husband, the giver cannot take back the gift. The only qualification is that a man must be just before he is generous. Therefore, if by making the gift the husband leaves himself in such a position that he cannot pay what he owes in full, anyone of his creditors can have the gift set aside, and take the property to satisfy his debt. Suppose, for instance, that Mr. Bull has stocks and shares worth £5,000, on the interest of which he is living. He gets into debt to the extent of £2,500, and instead of paying the debts in full, he makes a present of £3,000 to Mrs. Bull. He thus leaves himself with only £2,000, not sufficient to pay the £2,500 that he lawfully owes. He may have acted in ignorance, not knowing that his debts were so large, but that



does not matter. He cannot make his wife refund any of the money ; but any of *his creditors* may bring an action and have the gift declared to be null and void, because it was made to defraud creditors.

Fraud is a strong word, because it imputes dishonesty to the husband. How, then, can there be dishonesty, when Mr. Blank acted in mere ignorance ? In the legal sense there is, however, for this reason—that *the law presumes a man to be rational enough to know the natural consequences of his acts*. And surely when a man gives away money and leaves himself not enough to pay his debts in full, one or other of his creditors must be defrauded out of his lawful due. The loss to the creditor is the natural consequence of the gift to the wife.

I have shown one end of the rule, now let me show the other. There was not very long ago a case of an English sailor, whom I will call Mr. Neptune. This jolly son of the sea had sweethearts in more ports than one ; but when he finally made one of them Mrs. Neptune, another of the damsels brought an action for breach of promise of marriage. Before this case was tried, the sailor's maiden aunt died and left him £250, and he promptly made a present of it all to his wife. The action for "breach" came on for trial soon afterwards, and the jilted fair was awarded £200 damages by a sympathetic jury. She tried then to seize the £250 that had been given to Mrs. Neptune, claiming that the guileless sailor had made it over to his wife in order to defraud her (the plaintiff in the "breach" action). But the Court refused to deprive Mrs. Neptune of the money, on the ground that her husband had not at the time of making the donation any intention of defrauding his creditors. You see, that at the time he made the gift, Mr. Neptune did not owe his injured sweetheart a penny, and the jury might have turned out unsympathetic, in which case they would probably have awarded only a farthing damages. The sailor had no actual debts at the time he made the gift to his bride, so it would have been hard to say that he intended to defraud his creditors.

IN SCOTLAND the law is the same, with this addition, that not only may a creditor disregard the gift, *but the husband also can take the property back if he likes*.

A married man may be so fond of his wife, especially during the early stages of connubial bliss, that he is very likely to make gifts to her of an extravagant amount. Now, says the Scots law, by doing so it is possible that he will cripple himself, and "married persons shall not rob themselves out of love." Therefore the husband can, at any time, declare that he takes back the gift. If, however, he dies without taking it back, the wife keeps it absolutely. When he has made the gift by some paper in writing, the husband must make another writing for the purpose of undoing the donation. But where he has simply handed the thing over to the wife, with mere spoken words—such as, "Here, I give you this"—he can take it back by simply saying, "I want such a thing back," or words to that effect. The law only applies to gifts of something considerable. A man making a small present to his wife on her birthday, or at the New Year, cannot claim it back.

#### MRS. DIVES' DIAMONDS.

Mr. Dives made a present to his wife of some very valuable diamonds, with which, for a whole season, Mrs. Dives shone amongst the brightest at the

Opera, and dazzled the envious eyes of Society dames. At the time he made the handsome present, the husband was rich beyond the dreams of avarice. Had he retired from the business then, he could have settled with all his creditors at 20s. in the £, and still have had enough to live like a Grand Duke. But he did not retire; he speculated instead. The result was that Mr. Dives, who one year presented his wife with jewels worth a prince's ransom, next year was in the Bankruptcy Court. The crash was tremendous. How much in the pound the creditors received, this deponent knoweth not; but it is certain that a great part of their dividend was realised by the sale of Mrs. Dives' diamonds. **Her husband had become bankrupt within two years of the gift.** If he had held his head above water for more than two years from the date he made the present, Mrs. Dives would have kept the diamonds, though her husband's creditors had received less than a farthing in the pound. These events happened in England. Had they taken place in SCOTLAND, the creditors could have annexed the diamonds even after two years.

Gifts by wife to husband stand on the same footing as gifts by husband to wife. Just one word about

**Gifts before marriage.**—As I have indicated, any man about to marry may make a gift to his intended wife; and this is quite binding if it is made "in consideration of marriage"—that is, as part of the arrangement between the couple or their parents. If Mr. Cræsus wants to marry Miss De Vere, the lady's parents will very likely tell him that he ought to make a provision for her; and the would-be bridegroom makes a deed to this effect: "I give £10,000 to Mr. X. and Mr. Y. to hold as trustees for me. But if Clara De Vere marries me, then they are to pay the dividends on the stock, etc., to her for the rest of her life, and after she is dead to share the £10,000 amongst the children of the marriage." That is a rough sketch of what is called a Marriage Settlement.

Miss De Vere becomes Mrs. Cræsus, and receives her income for a year or so. Then her husband goes crash, and is made a bankrupt. His creditors can take his property, but they cannot touch the £10,000. It is, in fact, not regarded in law as a gift, but as a purchase, of which the price is the hand of Miss De Vere.

But this doctrine, like every other, has its limits. There was once an ingenious person with a few thousand pounds left him by his thrifty father, but with an ocean of debts incalculably larger than his fortune. It occurred to this thoughtful person that if, he could marry a lady not over-scrupulous, and settle all his fortune on her, he might still enjoy his property and laugh at his creditors. "For," he thought, "if I give my wife all my money in exchange for her hand and heart, though I may be a poor man, she will be a wealthy woman."

He confided his scheme to a woman of like mind with himself, who eagerly jumped at the idea. The deed of gift was made, and the marriage took place the next day.

Then the newly-wedded husband's creditors began to be troublesome. When they put the bailiffs in to seize their debtor's property, they were informed that he had transferred everything to his wife. They made unkind remarks. They suggested that the precious couple were swindlers. For answer, the husband



smoked his pipe and chuckled, and madame ordered them to the door. It then occurred to them to see what a judge would say about it. So they brought an action against the husband and wife to have the deed declared void for fraud. And they won. What the judge said was to this effect: A woman about to marry can make a bargain that she will not surrender the freedom of single life unless she is provided for. *But when the whole transaction is a scheme by the pair of them to defraud creditors*, and the sacred institution of marriage is simply used as a means of swindling, a Court of Law will interfere. Such unrighteous deeds will not for one moment be tolerated.

**Can a husband compel his wife to live with him?**—This is one of the cases where it is difficult to advise, for a lawyer must first tell his client "Yes," and then qualify his answer to such an extent that it becomes "No."

There was a case not long ago, known as the Jackson case, in which this point was raised in a manner that excited much interest in England. Mr. Jackson, who lived in Lancashire, married a young lady, who, presumably, had no great objection to him at the time, or she would not have married him. As soon as the ceremony was over the couple separated. The husband left his bride literally at the church door, and went to New Zealand to seek his fortune, while the lady returned to her own friends.

Up to this point the story reads like one of the old romances, where the knight marries the ladye fayre. They part at the church door, he going forth to fight the infidel, and she to her chamber in the moated castle to weep and pray for his return. The romance continues; after spending many years partly in fighting the dragons and paynims, the rest in wandering and captivity, the adventurous hero returns, of course, in disguise. The heroine thinks there is something familiar about his face and form, but cannot for the life of her imagine of whom he reminds her. He hears how rumours of his death have spread, how his wife has been pestered with suitors anxious to put an end to her widowhood, how she has repulsed their wooing, hoping almost against hope for the return of her dear one. And then, as the pilgrim (when these knights assumed disguise it was generally that of a pilgrim) talks with her, the suffering heroine's heart reveals to her the secret. The disguise is cast off, knight and ladye fayre embrace rapturously, and they live happily ever afterwards.

When Mr. Jackson went to New Zealand, he encountered no infidels, neither did dragons beset his path. He was not imprisoned by a giant or otherwise; and, in fact, his adventures were not more romantic than those of the average nineteenth-century-personally-conducted tourist or steady-going emigrant. This may account for the fact that when he returned to Lancashire, Mrs. Jackson did not receive him with the degree of warmth he had anticipated. She was not merely cool, she was positively frigid, and in the politest but most decided manner declined the pleasure of her husband's company.

Persuasion was in vain. Therefore Mr. Jackson tried force. He, with a friend and a four-wheeler, waited outside the church where Mrs. Jackson had gone to worship one Sunday morning. When the lady, quite unsuspecting, walked out of the church door, her husband and his friend seized her, hurried her into the cab, and drove furiously away. Her demands to be set at liberty were not heeded, and

for several days she remained a prisoner. The house, meanwhile, was in a state of siege, for Mrs. Jackson's friends were trying to get in, and Mr. Jackson was determined to keep them out. At last the wife's friends applied to the High Court in London for a writ of *habeas corpus*. This is a kind of command sent by the Court to anyone who holds another imprisoned, ordering him to bring the prisoner up to the Court, so that Her Majesty's Judges may inquire and see if the imprisonment is lawful and proper. Our old friend Sam Weller used to call it a "have-his-carcase," and he was not far wrong, for the writ begins like this:—

"To Septimus Seaven, of such a place. We command you to have the body of James Jay at our Royal Courts of Justice, Strand, on Monday the 10th day of November, at 10.30 o'clock in the forenoon."

Well, Mr. Jackson was ordered to "have the body" of his wife in Court on a certain day, and he duly obeyed. When she got there, she was asked if it was true that she was detained against her will, to which she replied that it was. Then the judges had to decide the question I asked at the head of the section: "*Can a husband compel his wife to live with him?*" After a great deal of very learned argument, the decision went against Mr. Jackson, and it was settled that by the law of England a man has no right to detain his wife against her will.

In fact, a husband may not use force to his wife at all. There was a notion abroad at one time, expressed in the popular rhyme—

"A dog, and a wife, and a walnut-tree,  
The more ye beat them, the better they be."

And it was even seriously stated by more legal authors than one, that an Englishman had the right to correct his wife, provided he used only his fist, or a stick no thicker than his thumb, and that he confined the "correction" within reasonable bounds. One old author slyly remarks on the frequency with which some husbands of the lower classes exert their supposed marital privilege. As a matter of fact no such privilege ever existed, and a woman whose husband beats her, or even touches her in anger, can summon him before a magistrate, and have him fined or imprisoned and bound over to keep the peace towards her.

Wife-beating is also a good ground for separation from a husband; but of that it is intended to treat in another section of this chapter (p. 41).

Another notion in England was that a man could **sell his wife**. I have been told that the idea has not quite died out even yet. Therefore it becomes my duty to my clients to tell them that the notion is, and always was, preposterous nonsense. Still, the sale of wives was extensively carried on at one time. The way of carrying out one of these queer transactions was by the husband leading his better-half to some public market by a halter fastened round her neck. He exhibited her there for a certain time—one hour in some markets, three hours in others—and then put her up for sale by auction, he himself officiating as auctioneer, and describing with more or less of rough wit and humour her various saleable qualities. There is a well-authenticated record of a man who sold his wife for half a pint of beer! Dear at the price, too, one would think, for the record tells us that her husband in putting



her up to auction declared her to be "a drunkard, a slattern, and a scold"; and she certainly acted up to his advertisement, for she railed and swore at her husband the whole time he was descanting on her virtues.

**The right of married partners to each other's society.**—Seeing that the husband cannot use physical force to compel his wife to stay with him, and that it is equally true that a wife cannot use physical force to compel her husband to remain with her, the question arises, have they any right to one another's society at all? If they have any such right, how do they enforce it?

The answer to the first question is emphatically "Yes," but when one proceeds to answer the second question the matter becomes more complicated. It was simple enough in England a comparatively short time ago. Either a husband or a wife whose partner refused to keep up the conjugal society and relationship could bring an action which was called a "suit for the restitution of conjugal rights." On its being proved to the satisfaction of the Court that the husband or wife, as the case might be, was refusing, without reasonable and proper cause, to live with the other, the Court would make an order on the offending party to go and live with the party complaining, and share his (or her) bed and board. Supposing this order was disobeyed, the complainant would make an application to the Court, with the result that the disobedient defendant would be sent to prison, and, what is more, kept there until he (or she) humbly apologised and promised obedience.

A few years ago, however, Sir James Hannen, afterwards Lord Hannen, at that time President of the Divorce Court, conceived a great repugnance to the system then in vogue. He said it was simply disgusting to him to be compelled to make orders, especially against women, the effect of which was to force them, under the threat of imprisonment, to live with men personally loathsome to them. Sir James induced Parliament to pass an Act relieving him of this disagreeable duty. Nowadays neither women nor men can be forced by the Court to live with and take up conjugal relations with persons repugnant to them.

True, there are still such things as suits for the restitution of conjugal rights, and the Divorce Court still makes orders commanding the defendant to resume the usual course of marriage life; but there is all the difference in the world between the consequences of disobedience now and the consequences as they stood before the Act brought about by Lord Hannen. Then, as I have said, the penalty of disobedience was imprisonment; now it is merely this, that *where one has obtained a decree for restitution of conjugal rights and the other disobeys that decree, such disobedience constitutes desertion, and desertion is one of the grounds upon which you may bring an action for divorce or judicial separation.*

**A wife's rights in respect of the husband's property.**—By the law of England a man can do what he likes with his own. By consequence, a husband can make a will and leave his wife nothing. Not everyone, however, makes a will, and if a married man die without having made one, his wife will always take a share of his property. The exact share she will take depends on two things, namely—

- (1) Whether the property be land or not land.
- (2) Whether they have any children or not.

Take the case of a man who dies leaving a wife and no children or

**grandchildren.** His wife will be entitled to £500, to be paid out of all his property (after paying debts, of course), a sum which is quite independent of the comparative wealth of the husband: the wife of a millionaire would have this £500, and so would the wife of a man who left only £1,000.

This £500 comes out of the freehold land and the other property proportionately, according to their value. Thus, if there are 60 acres of land worth £4,000, and £1,000 worth of other property—for instance, money, or stocks, or leasehold land—she will take £400 out of the land, and £100 out of the £1,000.

She will also be entitled to 20 acres, being *one-third of the freehold lands for her life*. This is what is called the wife's dower. And, in addition, she has a right to *one-half of the other property absolutely*. Thus, in the instance I have given above, of a man who leaves £4,000 worth of freehold land and £1,000 worth of other property, his widow will take £1,000 absolutely, and will have the use of one-third of the land for life. To make this important matter quite clear, let us put it in the form of an account:—

HUSBAND LEAVES				£	s.	d.
(1)	Freehold Land—60 acres—worth	...	...	4,000	0	0
(2)	Money, stocks and shares, worth (altogether)			1,000	0	0
<i>Total value of husband's estate</i>				£5,000	0	0
WIDOW'S SHARE.				£	s.	d.
(1)	Out of the Land:—					
(a)	£400 (being $\frac{2}{3}$ of £500)	...	...	400	0	0
(b)	20 acres for life (being $\frac{1}{3}$ of 60)	...	...			
(2)	Out of the money, etc.:—					
(a)	£100 (being $\frac{1}{5}$ of £500)	...	...	100	0	0
(b)	£500 (being half of the whole fund)	...	...	500	0	0
<i>Total</i>				£1,000	0	0 in cash,

absolutely, and 20 acres of the land, to use and enjoy as long as she lives.

Now take the case of a man who dies leaving a widow and children. Instead of taking £500, together with half the husband's money and one-third of his lands for her life, she will simply have *one-third of his lands for life, and one-third of his other property absolutely*. You will observe that she does not get the preliminary £500 at all, and only one-third of his money, etc., instead of the half that comes to her when there are no children. The only thing the same in both cases is the interest she has in his freehold land.

Here is an illustration, the same as the last, except that the husband does leave children or grandchildren.

A married man dies leaving 60 acres of freehold land worth £4,000, and £1,000 in cash, stocks, shares, leasehold land and the property *not* freehold land. The wife is entitled to the use of 20 acres of the land for her life, and one-third of the £1,000—that is, £333 6s. 8d. absolutely for her own. Let me put this in the form of an account:—



HUSBAND LEAVES				£	s.	d.
(1)	Freehold land—60 acres—worth	...	...	4,000	0	0
(2)	Money, stocks, etc., worth	...	...	1,000	0	0
Total value				£5,000	0	0

## WIDOW'S SHARE.

(1.) Out of the land : 20 acres (being one-third of 60 acres) for her use as long as she lives.

(2.) Out of the money, etc., £333 6s. 8d. (being one-third of £1,000).

Total :—£333 6s. 8d. in cash, and

20 acres of land to use and enjoy as long as she lives.

If you will compare this statement with the one given above in the case of the husband who has no children, you will see that the difference amounts to £666 13s. 4d. in cash.

N.B.—In this place, perhaps, it will be well for the *Family Lawyer* to give his clients a piece of friendly advice.

If you are a man with a little money, or house property, or land—especially house property or land—and you want to provide for your wife, **make your will as soon as you are married.**

I had a very distressing case brought to my notice some little time ago. A man had married rather late in life, and the lady, who had waited for him a long time, was a middle-aged woman. There were no bairns. The man, by steady saving, amassed enough to buy three houses, in one of which he lived with his wife, the other two being let to tenants. The husband died when he was sixty, and his wife was fifty-four; and almost the last words he said to her were these: "I've left you enough to live upon." No doubt the thought was some sort of comfort to him in his last moments. But he was mistaken.

He had made a will the day before he was married, saying: "I leave all my property to my dear wife." Had this affectionate husband been able to consult the *Family Lawyer*, he would have learned that **a will is cancelled by marriage**; and that is why a married man should make a fresh will. In the case to which I have alluded, the widow took £500 and one-third of the property for her life. In other words, she had one house out of the three to use for her life, and a sum of money which, on investment at the rate of 3 per cent., brought in an income of £15 a year. If the will had been made two days later, the widow would have had a house to live in and the rents of the other two—amounting to £30 a year for each house after paying expenses.

IN SCOTLAND the law is very much simpler. In that country there has always been a strong tendency to lay stress upon the duties of the married relationship—much more than in England. In consequence, we should expect to find there a duty of some such sort upon the husband to provide for his wife when he leaves her a widow. Scots law does not recognise the somewhat selfish doctrine that a man has a right to do as he likes with his own. On the contrary, it has for centuries applied the idea of justice before generosity. As I have indicated, a man who lives in England can leave all his property to a Home for Incurables, or a

Society for the Prevention of Cruelty to Animals, or a Hospital, or even a Home for Lost Dogs, and leave his widow to starve. Not many men have been found capable of such a dastardly performance, but I have known of at least one case nearly as bad. It was the case of a man who left all his possessions to a wealthy sister, knowing perfectly well all the time that his wife would be penniless on his death. There are countless numbers of cases every year where husbands leave their widows with the merest pittance, while giving away large sums to remote relations and charitable objects.

Such things are impossible IN SCOTLAND. There it is the husband's duty to make provision for his widow, and if he does not, the law will do it for him. The matter may be stated thus: If a wife likes to do so, she can make an agreement with her husband for him to set aside a certain sum which shall belong to her after his death. She is then bound by that agreement, and can only claim after the husband's death the amount she agreed to accept. On the other hand, if no such an agreement is come to, the widow is absolutely entitled to one-third of her husband's property. If he leaves her more than a third by his will, well and good; if he leaves her less than a third, or if he makes no will at all, she can claim a full third. Take these illustrations, which are all types of cases occurring practically every day:—

(1) A husband dies leaving £600. His wife has entered into an agreement with him to accept £150 as a lump sum by way of provision for her after his death. By his will, her husband leaves her nothing. Had she made no agreement she would have been entitled to £200; but seeing that she has agreed to accept £150, she must be content with that sum. If the husband had died worth £300 only, she would still have been entitled to her £150, though this would be more than the third. By making the agreement to take a lump sum, she takes the chance of its being more or less than her legal allowance.

(2) The husband dies worth £600. He leaves his wife £350; she is entitled to that sum, though it is more than her widow's third.

(3) Her husband dies worth £600, and leaves his wife £150; she can claim another £50 to make up £200 to which she is entitled.

But in the case of **heritable property** (*i.e.* lands and houses and other things which are **fixed to the soil**), the Scottish wife has a right to what is called her *terce*. This curious word is French, and was introduced into Scotland by the Norman nobles and lawyers who settled there in the eleventh, twelfth, and thirteenth centuries. It is really the same word as "tierce," which you will find in books on the art of fencing, and means *one-third*. The widow can, therefore, in Scotland, **claim for her life one-third of the rents and other profits** of all her late husband's lands and houses. Even if he makes a will and leaves his lands to someone else, passing over his widow, she has the right to her widow's third.

The only way she can be barred from claiming it is by her agreeing to let it go. She may do this if she likes, but she is not bound to do it unless she pleases.

Having considered the rights of the wife when the husband dies first, let us see what happens when the wife dies before the husband



**The husband's interest in the wife's property after her death.—**

IN ENGLAND a wife can now make a will of her property, and, like the husband, can do what she likes with her own. She can leave him all of it, or as much of it as she likes, or none at all. Just as in the case of a man, a woman's will is cancelled by her marriage. The only case, therefore, on which any general rule can be laid down, is that which occurs when a married woman dies without a will.

1. **As to land** (*not* leasehold land), a very curious rule prevails. It is this: If the wife had by the husband a living child who was capable of inheriting the estate, the husband has the right of enjoying the dead wife's land for the rest of his life. This curious right is called "the courtesy of England." Let us look at it in detail.

First, you will observe that the wife must have had a child by the husband—that is, not an illegitimate infant nor one by any former husband.

Second, the child must have been born alive during the mother's lifetime. A stillborn child will not do. In the old days it used to be thought that an infant was not born alive unless it cried; but now it is sufficient if the baby had an existence separate from its mother, because science has taught us, what our forefathers did not know, that a baby may live after it is fully born, and yet not cry at all. And it must be born while its mother is alive. Some of you may have heard of the surgical operation commonly called the Cæsarian operation, by which the life of the unborn may be saved even when the mother has ceased to breathe. Such an operation is of the very rarest occurrence, but when it does happen, the birth of the infant is not enough to give the husband any rights in his wife's landed estates.

Third, the child must be capable of inheriting the land. Some of you may have heard of "male entail." This is a not uncommon form of giving land, and it means that the estate is bestowed in such a way that no female child can possibly inherit it. For instance, if any of you having a daughter (we will call her Mary) who is about to be married and give her a piece of land or a house for her and her male descendants—if she dies leaving a daughter (whom we will call Jane) and no son, Jane will not get the land, nor will Mary's husband get any interest in it at all.

Fourth, if the child capable of inheriting is born alive, it does not make any difference to Mary's husband's rights, even if the poor baby dies before it is five minutes old. He (the husband) takes the land after Mary's death. Take the case of the "male entail" that I have just given. If Mary has a son born alive who dies in a moment, and then Mary dies, her husband will take the whole of the estate to be his for the rest of his life. After his death it will go back to the person who gave it to Mary.

2. **As to property which is not land** (except leasehold land). Here the husband is more highly favoured. He takes it all—a matter that requires no explanation.

So, you see, there is a great deal of difference between the rights of a widower and the rights of a widow when the other married partner has died without making a will. The widower either takes the whole of his wife's landed

property for his life, or else none at all. It depends on whether a child of the proper sex has been born or not. The widow has a right to only one-third of her husband's landed estates for her life, and it does not matter whether any children have been born or not. The widower swallows up the whole of his late wife's other property. The widow only has half of the other property, with £500 added, if there are no children ; and one-third, without the £500, if there are one or more children.

#### IN SCOTLAND

the law is different, and has become in modern times very much more simple, except as to house and land property. When the wife dies the husband has exactly the same right to part of her property as she would have had to a part of his property if he had died first. He is entitled to one-third of her whole property, and she cannot make a will so as to make him take less. On the other hand, she can make a will giving him more than a third. Or they can, either before or after they are married, make an agreement that he shall accept a lump sum instead of the third to which he is entitled by law. If you want to see how this works out, turn to page 35, and see how the same rule applies when the husband is the first to die.

**As to land and house property,** there is a right in the Scottish husband very like that in the English husband, but not quite the same.

When a Scottish wife has land at the time of her death, sometimes, after her death, her husband is entitled to take the whole of the revenues of her land for the rest of his life. Sometimes he is not entitled to anything out of it at all. And it depends on the answer to two questions :—

- (1) How did the property come to the wife ?
- (2) Have husband and wife made any agreement ?

Now, as to the first question. The wife may have got the property in one of three ways—namely, (1) by purchasing it ; (2) by a gift ; (3) by inheriting it from some of her forbears. If she got it in either of the first two ways, her husband has nothing to do with it after her death. If she got it in the third way—that is, by inheritance—he can claim his “liferent,” whether the wife made a will or whether she did not. But suppose she took the land by inheritance, question (2) becomes important.

**Has the husband agreed with his wife** that he will not claim what was his due ? If he has so agreed, then he cannot afterwards turn round and claim ; but there is no way, legally, for the wife to make him agree.

As in England, before the husband can claim, he must prove that his wife had a child by him born alive, and that this child was its mother's heir. If the lady is a widow with a son, and marries again, of course no child of the second marriage can be the heir of its mother—that is the eldest son's privilege. So the second husband cannot possibly get anything out of the landed estates when the lady dies.

As to the child being born alive. In Scotland the lawyers and judges stick to the old rule, and do not believe a baby to have been born alive unless it has been heard to cry. As a Scottish lawyer of eminence once remarked, “Many an



infant has stood between its father and £1,000 a year because it wouldn't scream." Therefore, let family men—especially Scottish family men—console themselves with the reflection that as there is a silver lining to the darkest cloud, so there is sometimes much virtue in the screams of the little stranger.

### DIVORCE

is a subject that need not be discussed in any detail by *The Family Lawyer*. Still, no book attempting to deal with the relations of husband and wife would be complete without some mention of this mode of putting an end to the relationship. There are two kinds of divorce as the word is used in popular phraseology. The one kind, which really puts an end to the marriage, is properly called divorce, and the other kind is really not divorce, but judicial separation.

IN ENGLAND a husband may obtain a divorce from his wife on the ground of adultery, or he may obtain a judicial separation on the ground of cruelty or desertion.

A wife may obtain a divorce from her husband on the ground of misconduct and desertion, or cruelty and desertion, or misconduct and cruelty. She may also obtain a judicial separation for any one of these three things. It is not part of my present business to discuss the inequalities of the divorce law. It is simply my duty to point out that the rights of the husband and the wife in this respect are not equal. The inequalities consist in the fact that while the husband can obtain a divorce for simple violation of the marriage vow, the wife cannot; the wife can ask for a divorce if the adultery of the husband is what is called incestuous—that is, committed with a woman whom he could not marry, even if he were a single man.

There is one subject in this particular very interesting to consider as showing the influence of the Christian religion upon the marital relations. In primitive society the wife is a mere chattel, useful in her way, but having no more equality to the husband than his oxen or his horses. One can hardly wonder at this when one considers how she was married. Some early tribes invariably captured their wives in warfare after the manner of the sons of the tribe of Benjamin. When they became a little more civilised, instead of the bride being carried off by main force, she was generally purchased. It follows from the mere fact of woman's inferior position that she could be divorced at the pleasure of her lord and master. In course of time women came to be recognised as human beings, inferior to man, it is true, but still not much inferior. And then divorce became the right not only of the husband but of the wife, and a woman who found herself uncomfortable in her husband's house could leave it for ever. You have read how "for the hardness of their hearts" the Mosaic law allowed the Israelites perfect freedom of divorce, whether for cause or no cause. The Roman law, from which the legal systems of nearly all European nations are derived, also in those early stages allowed a husband to put away his wife, or a wife to put away her husband, even for a mere fancy.

It was not until the reign of Constantine—the Emperor who made Constantinople the first city of the world, the first Roman Emperor to embrace Christianity

—that the idea of divorce for cause only became part of a system of law. The Christians of that time did not believe in divorce, and the bishops persuaded their Imperial convert to give effect to this doctrine by a law. But time-honoured institutions are not changed in a day, and Constantine was quite unable to prohibit divorce by mutual consent. What he did, however, was to declare it unlawful for one of the married partners to put away the other except for some good and valid cause. By the eleventh century after Christ the law in all Christian countries was this: you could not have even for cause a divorce which put an end to marriage altogether. You could have a judicial separation if you could prove cruelty, adultery, or desertion. But the effect of this was to leave the unhappy pair practically divorced yet unable to marry again.

In England the practice arose to allow a total divorce in certain cases, but the mode of obtaining it was so expensive as to be almost unattainable except by the very rich. The method was to ask Parliament to pass a private Act to dissolve the marriage. In Ireland this is still the only way to obtain a severance of the marriage tie; and I have read of a tailor in Dublin whose wife left him to live with a paramour, and who saved up for twelve years to accumulate the £600 to enable him to come to the House of Lords and secure a divorce by Act of Parliament.

In England the law was the same until 1857-8, when the present way of obtaining a divorce or judicial separation was instituted. Now, as you may see from the newspapers every day, divorces, as well as separations, are granted by a judge. Another thing not generally known is, that if a man or woman wants a divorce (which cannot be granted by a magistrate), so as to be entirely freed from the marriage bond, and such a man or woman has not money enough to pay the costs and expenses, poverty need not be an obstacle, because any person who is so poor as to be able to swear that he is not worth £20 in the world, without counting his clothes, will be allowed to bring his action like a pauper. This means that some solicitor will be ordered to act for the poor man or woman for nothing, no court fees will be charged, and a barrister will be asked to appear at the trial for nothing.

A woman who has no money, and wants a divorce, can always get her case taken up by a solicitor if the husband has any money, because **a husband is always liable to pay his wife's costs of a divorce suit**, whether he brings it against her or she against him, and whether he wins or loses. But when the wife brings the action frivolously, she will not be allowed any costs.

IN SCOTLAND the law differs from the English rule in two respects, namely:—

(1) The husband and wife are on an equal footing.

(2) Cruelty is not one of the grounds for divorce, but only for judicial separation.

By the Scots law, a husband or wife who has committed adultery, or who has deserted the other for a space of four years, is liable to be divorced.

In England, desertion counts as an offence if it is for two years; but in both countries mere absence from home is not desertion. A husband may be away for half-a-dozen years and yet not be a deserter of his wife. For instance, take the case of a soldier ordered abroad on foreign service, or a sailor going for a



long voyage. To make the absence a desertion, there must be some circumstance to show that the husband, or wife, intends to break off the married relation. As, for instance, where a woman leaves her husband in order to set up in business for herself, she refuses to live in her husband's house, and objects to his living in hers. This is desertion.

**A popular mistake.**—Some people—a good many, in fact—have become possessed of the idea that if a husband leaves his wife for seven years she can marry again, and the same in the case of a wife leaving her husband. That is not so. The real state of the law is this :—

If Mr. Blank goes away from Mrs. Blank, and Mrs. Blank does not hear of his existence for seven years, she may marry again ; because **a person not heard of for seven years is supposed to be dead.** But Mr. Blank may be alive all the time ; and if he is, the second marriage of his supposed widow will be no marriage at all. The children will every one be illegitimate, just as though no second ceremony had taken place. The only difference between this case and the case of a woman who marries again knowing her first husband to be alive, or not having waited the seven years, is that Mrs. Blank is not guilty of bigamy, and the other woman is.

**A word of caution.**—Let me give a word of caution about divorces. Both in England and Scotland it is unlawful for a husband and wife to agree to a divorce. This is called collusion.

A case came under my notice once where a husband and wife were tired of one another, and they agreed to have a divorce. The man wanted to marry some other woman, and the wife was quite ready to oblige him so far as she could. So the wife brought an action for divorce, on the ground that her husband had committed adultery (which was true), and also on the ground that he had been guilty of cruelty (which was untrue). The husband did not defend the case ; but a certain official, called the Queen's Proctor, caused inquiries to be made, found out all about the arrangement, and made the facts known to the President of the Divorce Court. The result was that the couple did not get a divorce or even a judicial separation.

In Scotland the Queen's Advocate keeps the same sort of watchful eye on all divorce cases.

**Separation Orders by Magistrates.**—There has now been created a new tribunal which can try matrimonial cases. Until the 1st of January, 1896, a wife whose husband committed an aggravated assault upon her was entitled to go to the magistrate and obtain a summons. On the hearing of this summons, the magistrate might grant a Separation Order—that is, an order by which the wife was released from living with her husband, and the husband was compelled to make his wife an allowance. But if the wife had any other complaint to make, she had to go to the Divorce Court. This was all very well for the women whose husbands had means, but it was not very satisfactory for the women of the working classes ; and the practical result of the law was that a working man might commit any sort of matrimonial offence against his wife so long as he did not beat her, and she had no remedy. Although, in theory, the Divorce Court was open to all, yet, in fact, it was inaccessible to the very poor.

The Summary Jurisdiction (Married Women) Act (1895), however, remedied this evil to some extent. It practically created a poor woman's divorce court in every town, city, and district—a court that is cheap and speedy. To understand the effect of this new law, let us recapitulate the causes for which a wife may obtain a divorce or a judicial separation from her husband in the divorce court. They are:—

*Causes of Divorce.*—(1) Adultery and desertion ; (2) cruelty and desertion ; (3) adultery and cruelty.

*Causes of Judicial Separation.*—(1) Adultery ; (2) cruelty ; (3) desertion.

Now the poor woman's divorce court cannot grant a divorce. That is, it cannot entirely undo the knot tied by the parson and the clerk. But it can make an order for judicial separation for any of the causes, except adultery, mentioned above. If a woman can prove that her husband has been guilty of cruelty, she may have a separation order from the magistrates. This is far wider than the old law, which only gave such power to the magistrate when there had been an aggravated assault. Cruelty may not consist in actual beating ; it may be locking up in a room without food. By perpetually frightening the wife without touching her, and in a thousand and one ways, the husband may be guilty of cruelty, though he commits no assault. I have explained the meaning of cruelty more fully on a previous page. But the cruelty of which the husband has been guilty must have been **persistent cruelty**, or else the poor woman's divorce court will not interfere. And, secondly, such cruelty must have caused the wife to **leave her husband**. In other words, if the wife is able to live with her tyrant, she must continue to do so ; and it is only when the cruelty becomes so persistent as to be unbearable and she leaves him, that she can claim a separation order.

A second case in which the magistrate may order a separation is when the husband has **deserted** his wife. I have told you before what desertion is (p. 39). So far, the poor woman's divorce court grants separation on much the same grounds as the ordinary court does, except for adultery. There are, however, two other cases where the poor wife can have assistance which the ordinary divorce court could not give. One is in the case of aggravated assault, and of that I have told you already. The other is wilful neglect to provide reasonable maintenance for her and the young children. This is a very important provision of the law, showing the tendency of modern thought, and the spirit of modern legislation in the direction of protecting the physically weak from being preyed upon by the strong.

How many scores of times have you heard this kind of story : “ Mrs. Jones, who lives in Blind Alley, is a hard-working woman. Her husband the lazy scoundrel ! never does a stroke of work ; and his wife has to keep him and the children and herself by taking in washing.” Worse still is it when the tale is varied, as, alas ! it too often is, by the circumstance that the husband does odd jobs occasionally, but spends all the money on drink. One of the objects of the Act of Parliament with which I am now dealing is to give a wife protection against a lazy, drunken husband. She always could leave him if she chose ; but then he could prevent her from taking the children with her. But now, if he neglects to provide means of support for her and the babies, she may first leave him, and



in the next place take out a summons before the nearest magistrate's court, claiming separation.

Now let me show you what are **the terms of a separation order**. The first part provides that the husband and wife shall separate. Then the magistrate may order that any or all of the children who are under sixteen years of age shall be in the custody of the mother. In the third place, the husband will be compelled to make a payment towards the support of his wife and children. If he does not pay, his furniture (if he has any) can be seized and sold ; or he may be sent to prison for not more than three months. The amount a husband will be ordered to pay depends on his and the wife's means. I have known a man earning twenty shillings a week being ordered to pay 12s. 6d. of it to his wife. In no case can the magistrates compel the husband to pay more than £2 a week. The idea is, that when the husband's means are such that he can afford to pay more than that sum, the wife ought to apply to the Divorce Court, and not to the magistrates.

**The wife may forfeit her right to the allowance** in two ways. The first is by committing adultery. For the law will not compel a husband to support an adulterous wife, even if he, by his cruelty or misconduct, has driven her away. The second is by returning to the husband and living or having intercourse with him. Take a case like this : A man treats his wife with persistent cruelty, so that she leaves him, and afterwards applies to the magistrates for a separation order. She wins her case, and the husband is ordered to pay 15s. a week. He does so for a time, and then he goes to his wife, promises to be kind to her if she will forgive him, and so induces her to live with him again. Before long he breaks his promise, and again his cruelty drives her away. But her right to the 15s. a week has vanished. All she can do is to take out another summons, similar to the first one, and ask for a fresh separation order with a fresh allowance, because she has, by going back to her husband, condoned his early offences and blotted them out.

Let me give to women who wish to take advantage of this Act of Parliament a word of advice. The first is—not to go into court with a lot of fanciful grievances against their “better-half.” There was a woman who applied for a separation the other day because her husband habitually stayed out late. I don't know under what clause of the statute she thought this dreadful offence would lie. She may have deemed it “persistent cruelty,” or she may have imagined that it amounted to “desertion.” All she took by her complaint was a lecture from the magistrate on her folly and on the absurdity of wasting his precious time by such absurd nonsense.

Again, the magistrate who hears the case has a very wide discretion. If he thinks the case ought to have been brought in the Divorce Court he will dismiss the summons. So that no rich woman need apply, nor any woman who wants a real divorce.

I would make another observation about this addition to the statute-book. Women have very frequently complained, and with justice, of the inequality of the law. “A woman,” say they, “is less in the eyes of the law than a man is. If he is unfaithful to his wife, and is neither cruel nor a deserter, she has no remedy ; but if she is unfaithful he can have a divorce.” True enough. But the Act for the

protection of married women passed in 1895 is a swing round the other way. It allows a wife to obtain a separation from a husband who is cruel, or who deserts her, or refuses to do his lawful duty of supporting her. But the husband has no corresponding remedy. If his wife is a drunken slut who refuses to fulfil her household duties, neglects the home and the children, wastes her husband's wages at the "public," or even deserts him for a time, he has no remedy. So long, in fact, as she does not become an adulteress she can do almost anything she likes.

It is not my business, as a lawyer, to suggest a remedy for this state of things. My duty to my readers is finished when I have explained to them the law as it is. But I am free to confess that the laws relating to husband and wife in England are full of anomalies, not the least of which is that the statute which enables a poor woman speedily and cheaply to get rid of a vicious, lazy husband, gives to the poor man no way of freeing himself of the drunken, idle wife.



## CHAPTER II.

### PARENT AND CHILD.

A little ancient law—Coming of age—When is a man twenty-one?—The father's right to the custody of the child—The child's right to choose with whom it will live—Rights between father and mother—Father's right to choose the child's religion—Rights of the mother—When the parents are divorced, who takes the children—A sensational case—Parent's right to chastise a child—Scots law as to father's and mother's rights to custody and control—Child's earnings and choice of profession—The child's marriage—Mother's rights after father is dead—A dead parent's property—England—Scotland—The duties of children to parents—Cursing a parent—Seduction of a daughter—Taking a child away from its parents—English parents' liabilities for child—Maintenance—Protection—Education—Half-timers: a point for working men—Scots parents have heavier liabilities—Parents' rights over children's property.

**A**CCORDING to a recent writer on this subject, "the state of the law as to the relation of parent and child affords a very fair criterion of the state and degree of a nation's civilisation." And if we regard the laws of other peoples, especially of ancient nations, we shall see how true is the saying that I have quoted. The Roman father and the Spartan father of ancient history, like the Hindu father of to-day, had absolute power over their children. Even if he killed his child the law did not interfere with the citizen of ancient Rome; and it was not until Christianity became the religion of the State that any punishment was imposed on such an unnatural parent. Then the Legislature went to the other extreme, and enacted that a father who killed a son should be subjected to the same punishment as a son who had killed his father. That punishment was capital, and by way of making death more horrible, the criminal was sewn up in a sack along with a cock, a viper, and an ape, and cast into the nearest river or sea. But even then the son was under his father's power, and subject to his almost absolute control in private life. In public life he was quite his father's equal, and possibly his superior; but be he judge or consul, magistrate or victorious general, his father could beat him, let him out on hire, and even divorce him from his wife.

In England there has never been anything like this, and a child has always been free from parental control at a certain age.

**Coming of Age.**—We are so accustomed to think of twenty-one as the age of manhood, that it is hard to imagine any other time of life as the one fixed for Majority. Yet it is a fact that only amongst the nations of Western Europe is this the age. By almost universal consent, fourteen was the age of manhood, and twelve of womanhood, until the Middle Ages, when the introduction of heavy armour caused the age to be raised. But although nearly everybody knows that twenty-one is the age of Majority, very few know when a man is twenty-one. If

anyone is under the impression that he was or will be twenty-one on the twenty-first anniversary of his birthday, he is very much mistaken.

I once knew a very young lady, who wanted to marry a very young gentleman who was not looked upon by her parents with the same degree of favour as by their daughter—in fact, they forbade the match. Now, the young lady was, as the parents might have expected, more determined than ever that she would marry the object of her choice and none other. But still she did not want to disobey her parents, and, besides, they might have forbidden the banns. But at eight o'clock on the morning of her twenty-second birthday she walked out of the house and was married by special licence. She thought she was acting with great promptitude; but really she had wasted twenty-four hours. For it is a fact, though not generally known, that a man attains the age of twenty-one the day before his twenty-second birthday. This will appear plain on a little calculation. If a child is born on the 1st of January, he has lived a year on the completion of the next 31st of December, for from January 1st to December 31st (both inclusive) is a full year. It is true there may be the fraction of a day under; but the law takes no notice of very little things, such as fractions of a day, and that is why if a thing has to be done on a certain day it is as well done on the last moment of that day as if it were accomplished on the first moment, and as well on the first moment as the last.

IN SCOTLAND the same rules apply as to full age. Twenty-one is the age of manhood and womanhood, and the age is reached the day before the twenty-second birthday.

I shall treat the subject of this chapter from three points of view, namely: (1) The legal relations between parent and child; (2) The legal position of the parents as against one another; (3) The legal position of the parent in respect of the child as against outsiders.

There is no part of the law the subject of more popular misconception than the part relating to the rights of parents and the duties of children; and I have no doubt that before you have finished reading this chapter, many of you will receive more than one rude shock. In the first place, there is **the father's right to the custody of his child**. Let us see what sort of a right this is.

#### IN ENGLAND,

so long as an infant is *of tender years and unable to choose for itself*, the father can compel such infant to live with him or with anyone whom he (the father) chooses. Many people think that a father has this right until the child is twenty-one, but they are very much mistaken. The law is, that as soon as a child has sufficient mind of its own to exercise a rational choice, the child can choose its own abode. At what age the child is sufficiently rational for this purpose depends entirely on the individual intelligence of the youth or maiden. As every parent knows, you cannot fix with any degree of precision the age at which the child arrives at years of discretion. Tommy is quite a man at thirteen, while Willie is a mere child at fifteen or sixteen; and in such a case, Tommy will be allowed to choose his own domicile at thirteen, and Willie must wait for a year or two.



*Approximately, you may put down the age at fourteen ;* but, as I have said, it is impossible to draw a hard and fast line. I have known a little girl allowed by a judge to exercise her choice at the age of eleven, but this was in a case of dispute between a father and mother who were living apart ; and the judge had an interview with the child, and came to the conclusion that she was unusually precocious and quite able to choose which of her parents she would live with. Such a case as this, however, does not happen very often, and I do not think that any judge or magistrate would, as a rule, allow a child to leave home and set up on its own account at such a tender age.

But although the child is entitled to exercise its own choice on reaching years of discretion, yet as between the father and the mother, and between the father or mother and outsiders, there are certain strict rights. And, first, let us consider what are the respective rights of the father and the mother in their children. Disputes sometimes happen, and married people separate, and then there is often a controversy between them as to who shall have the children. It is a popular belief that in such a case the father takes the boys and the mother the girls. This, however, is *not* the law. They can, if they please, make an agreement to that effect, but subject to this, that the Court will upset that agreement if it is for the benefit of the child to do so. Indeed, in all cases concerning infants, the thing regarded by the judges as of paramount weight and importance is the benefit of the child. So in any case where the mother has the custody of a child, the father has the right to deprive her of that custody if she is *unfit* to have it. On the other hand, if the father has the custody and is unfit for it, the mother can apply to the Court and have the infant handed over to her.

Suppose husband and wife are not living together, and have made *no* arrangement about the children, the father has the best right to the control of their education. But if he shows himself unfit to have the bringing-up of them, the mother can apply to have them given up to her.

In one respect the mother's right is inferior to the father's, for a father has always the right to choose in what religion his children shall be brought up. This is not only a *right*, but a most imperative *duty*, and a father cannot in any way renounce it. When people of different forms of religion intermarry, they sometimes agree that if there are any children, the boys shall be educated in the father's faith, and the girls in the mother's, or *vice versâ*. There is no objection to the honourable carrying out of such an arrangement ; but if the husband likes, he can entirely disregard it. The question was fought out not long ago in a case where a Protestant husband had agreed with his Roman Catholic wife for the education of the sons of the marriage as Protestants and the daughters as Roman Catholics. Afterwards, conscientiously believing that it would be detrimental to the best interests of his daughters to permit them to grow up in the Roman faith, he refused to carry out the promise he had made. The wife was equally firm in her spiritual convictions, and tried to compel her husband to fulfil the compact. When the case came before the Courts, it was argued on behalf of the mother that she had only consented to be married on the strength of the agreement, and that, therefore, such an agreement was not a mere friendly arrangement, but a legal and binding contract. Still, the decision went

in favour of the father, because, although the agreement was intended to be a solemn contract, it was *impossible* for the father by any act whatever, or *in any circumstances*, to give up the control of his children's religious education. This sad case did not end here, for the mother persisted in her attempts to have her daughters instructed in what she deemed the true religion. She took them to the services of her Church, and to the confessional, whereupon the father brought an action, and obtained an injunction to prohibit these practices, and to prevent the unhappy mother from interfering with her daughters' religion at all.

So highly does the law regard this paternal privilege, that even when a child is removed from its father's control on account of his cruelty or other misconduct, that child *must* be brought up in the faith which the father chooses—provided always that if the father wants to have it educated in no faith at all, his wishes will be disregarded. I cannot understand, nor could I ever comprehend, why this preference should be given to the father as against the mother—at all events, in every case. It seems to me peculiarly absurd that a father who is thought unfit to have the physical training of a child committed to his care, should have an absolute right to dictate the faith in which that child should be educated. And this absolute right is not one which has survived from old time by the mere inaction of the Legislature. It has actually been re-enacted by Parliament so recently as 1886, by the Guardianship of Infants Act of that year.

There is only one check on the spiritual dominion of the father, and this is the doctrine enforced by the Court, "*that above all things the benefit of the child must be considered.*" And the doctrine is applied in this way: If the father has allowed the child to grow up in a particular form of faith, and afterwards, when the infant has attained an age when he is capable of thinking for himself, the father wishes to make him attend the services and receive the teaching of another religious body, the Court will not suffer this. The reason always assigned is that it is bad for a youth to be unsettled in his religious beliefs. Therefore, when any unfortunate dispute arises between parents (such as I have related above), the judge will always inquire the age, and will generally have an interview with such child. If the latter shows that he or she has any settled convictions and expresses a wish to embrace the religion of the mother, the judge will allow this to be done. But the conviction avowed by the child must be one for which he can show a reason. It must not be a mere statement put into his mouth by one of the contending parents.

I have shown how the father has the first right to the custody of his children and to the control of their education. I have also shown that he has an almost absolute right to dictate the form of religion in which they shall be trained. Let us now consider **the rights of the mother** in these respects. To put it generally, so long as the parents are living together, and the father is not guilty of cruelty to any of the children, the mother has no legal right to interfere between him and them. And if they are living apart by mutual consent, the father has still the right to the children, save in so far as he has agreed to give them up. (Remember that an agreement to give up the religious control is of no value.)

But the father, by law, is only a **guardian** of his children, and, like any other guardian, he can be removed from his office for misconduct. The position of the



mother is that she has the next best right to the father. It seems a matter of course that she should have a right as good as the father's ; but, as a matter of historical fact, it is only within comparatively recent times that she has had any rights at all. Now, **if the parents are divorced**, the custody of the children depends on the discretion of the Court, who can order either parent to have the custody of the children, or give the girls to one and the boys to the other, or can appoint an outside guardian if convinced that *neither* of the parents is fit. As a rule, the custody of the children of the marriage is given to the innocent party. Thus, if the husband has been guilty of misconduct, the wife will have the children, and *vice versa*. But the one who is deprived of the care of the children usually obtains an order for access to them periodically. The common case is where, say, the wife has been guilty of infidelity, the custody of the children will be bestowed on the husband, but their mother will be allowed to see them once a month.

It does not always happen that the innocent spouse obtains the custody of the children. Thus, where a woman has obtained a divorce for cruelty and desertion, or (in Scotland) for cruelty alone, the husband will often be allowed to keep some of the issue of the marriage, unless it can be shown that he was or is likely to be cruel to them ; because a man may be very fond of his children though he has quarrelled with their mother. IN SCOTLAND the law as to custody of children when the parents have been divorced is the same, practically, as in England.

But sometimes married people who cannot live amicably together separate. Either the husband leaves the wife, or the wife the husband. If the husband leaves the wife on account of her serious misconduct, he is entitled to take the children with him. If she leaves him without any misconduct or cruelty on his part, he has the right to retain the children, and if she takes any of them away with her he can fetch them back. Suppose she refuses to allow him to take them, or conceals them somewhere, the husband has a very speedy remedy. He can apply to a judge for an order to compel the wife to bring the children to the court, where they will be delivered up to their father unless the mother can show some good reason against it. Such good reason would be that he is an immoral man, or a cruel man who was in the habit of ill-treating the children when they did live with him. But the judge will want *very good reasons* for depriving the father of his primary right. If the children are able to talk sensibly they will be interviewed by his lordship in private, to try to find out from themselves what they think of their parents. I have been told that these interviews are sometimes anything but formal. One kindly old judge was one day discovered in his room with two little children, one of five and one of seven years, telling them a fairy tale. By this not very judicial proceeding he put them quite at their ease, and they were easily led on to tell the "kind gentleman" all about papa and mamma.

So much for where the wife deserts her husband, or by her conduct causes him to leave her. Now let us consider what will happen when *the husband leaves the wife*, or where his behaviour gives her some reason for leaving him, or where, the fault being on both sides, the spouses separate—an occurrence far more frequent than it ought to be. In these cases, unless they can agree about it, they will have to go to the Court, and the Court will take this line : as to those children who are of very tender age, the mother will as a rule be preferred, especially if the separation

has taken place through the husband's fault. Thus, where a wife separated from her partner because he was nearly always drunk, and had an unpleasant habit, whenever her back was turned, of taking her property and pawning it, the judge in Chancery ordered the wife to have the entire custody of all the children until they were sixteen years of age. The father was allowed to see each of them once a month. I may say that this father who was so anxious to have his children to live with him had not contributed a penny to their support for two or three years, and, probably, only demanded the poor infants in order to annoy his wife. In the "good old times" he would have succeeded, because by the old law of England a father had an absolute right to the custody of his children, unless they left him of their own accord when they became old enough to think for themselves. (This is at about fourteen; see pp. 45-6.)

The law was altered in consequence of a sensational case that occurred in the year 1837. A certain Mr. Greenhill, who had only been married a few years—there being two very young children of the marriage—formed an adulterous connection. His wife left him, and took the children with her. Mr. Greenhill went to her house and took them back to the house where he was living with his paramour; but the mother followed, and by means of a stratagem took possession of them again. The father applied to the Court of Queen's Bench, and the judges were compelled, in the state of the law as it stood then, to make an order that the children should be delivered up to him. Then Mrs. Greenhill took one of those bold steps that a woman will take to protect her offspring. She abducted the children, and fled out of Britain. Her strong action called the attention of Parliament to the defective state of the law, and an Act\* was passed giving power to the Court of Chancery to make orders for the access of mothers to their infant children, and in cases where such children were under seven years of age, to order that the mother should have the *sole* custody. Thirty-six years later the age was raised from seven to sixteen;† so that *now* a mother may have the sole control of children until they reach sixteen, if she can satisfy a judge that the father is not a fit person to manage their education and moral training.

**The right of a parent to chastise his offspring** is one of a far less absolute character than fathers and mothers generally suppose. I have occasionally seen in the police courts men and women who were very much astonished to find out that they had no business to thrash their children at their own sweet will. Most writers on this subject say that a father has a right to correct his children so long as he confines himself within the bounds of moderation. And this statement of the law is quite correct—if properly applied.

As a matter of fact, if a father inflicts corporal punishment, it is not in exercise of a *right*, but in discharge of a *duty*. It is his duty to educate his child. I do not confine the word "education" to mere learning, but I use it in its extended and more proper meaning of building up the mind and character. To do this is a parent's moral duty, and in doing it he will have the assistance of the law. The law considers that a father and mother should have the right to use force as a last resort when the son or daughter is not amenable to moral suasion. Therefore, if a child does anything naughty, or disobeys any reasonable command, the parent may

\* *The Infants' Custody Act, 1837.*

† *Infants' Custody Act, 1873.*



inflict personal chastisement. But in all cases such chastisement must be kept within the bounds of moderation and reason. It is unreasonable, and therefore illegal, to strike a child for nothing, even though you do not hurt him. If he has been naughty or disobedient, it is unreasonable and immoderate to beat him with a *heavy stick*; or to inflict a *great number of blows*; or to put him on *short diet for very long*; or to strike him on some part of the body which is particularly liable to *permanent injury*. The proverbial "cuff on the ear" is on the verge of illegality, and must be gently administered, or the striker will be guilty of an assault.

While I am dealing with this point, let me state that the schoolmaster and schoolmistress have the same power of inflicting punishment that parents have. In fact, their legal position is semi-parental. They are regarded as a kind of agent, engaged to assist the parents in their duty of education; and as it would be absurd to give them the responsibility and authority without the means of making their command obeyed, they are allowed to inflict reasonable correction.

Let me reiterate that whoever has the power to chastise a child, must only exercise it for the child's benefit. Any other use of the power is as wrong legally as it is morally.

IN SCOTLAND the **rights of a father** are rather greater than in England, in that he has a greater amount of control over the child's actions. As to the **custody of the child**, the primary right is with the father; but, as in England, the Court may interfere for the benefit of the child. This happens where the father is guilty of cruelty, either actively or by neglect, or where he is a man of such bad character that it will be dangerous to leave the child in his charge. Of course, the Court does not move in the matter of its own accord. Somebody—either the child or one of its friends—must bring an action to deprive the father of the custody. The usual and most suitable person to do this is some near relation, who offers to take care of the child; and if the Court orders the father to be deprived of the custody, it will order him to make an allowance for that child's maintenance.

But as the father has the primary right to the custody of the child, and as in all human probability he is more deeply interested in its welfare than anyone else, it will require a *very strong case* to induce the Court of Session to hand the child over to the care of another. And the father, having the custody, is entitled to direct everything relating to the person, the education, and the mental improvement of his children. He has also, as in England, the **right to correct** children living under his roof, provided that he keeps within the bounds of moderation, and only uses his power for their benefit.

**Children's earnings and choice of profession.**—IN ENGLAND, when a child is living at home after leaving school, and is going to work, the parent usually takes its wages in return for food, lodging, and clothing. I have known a father say to his son, "You are not a man yet, and what you earn is mine," and to make a great favour of allowing a son under twenty-one to retain part of his own earnings for pocket-money. *This is another popular fallacy.* In America the earnings of a child living at home belong to the parent with whom he resides, but in England it is not so, and never was. The child's earnings are his own

property, and if he contributes something to the family funds by way of payment for board and lodging, he is a lodger, and such payment is made not as a child, but as a lodger.

To such an extent do some people believe in their rights over their children, that I know of a case where a widow, who owed money to a shopkeeper, sent her young daughter to work at the shop for so much a week, which was to be deducted from the debt owing by the mother. In other words, the mother was using her child's labour absolutely for her (the mother's) own benefit. And when the girl, being ill-treated, wanted to leave the situation, the shopkeeper *insisted* upon her remaining, because her mother had promised that she should stop until the debt was all worked off! He did not grasp the idea that such a proceeding would be practically slavery, neither did the mother. In fact, there are hundreds of people in England who imagine that a child under age is to all intents and purposes the property of its parent. Of course, this is a great mistake. Every English child has as much right to dispose of its own labour and of the proceeds of its labour as a full-grown man or woman has.

I was recently consulted (informally) by a lady of my acquaintance on the following point:—She said, "My housemaid Mary is a very good servant, whom I should be very sorry to lose. But her mother, a drunken woman, has ordered the girl to leave unless I raise her wages and pay them direct to the mother. The poor child, who is under age—only sixteen—is in great distress, because she is very comfortable here, and does not want to leave. Now, you are a clever lawyer. Do, please, advise me what to do." It was gratifying to be able to administer comfort to my fair friend. "My dear madam," I replied, "no mother, be she drunken or sober, has any right to do what this woman says she intends to do. A girl of sixteen is quite competent to choose a situation for herself, and has a right to her own wages. The mother is not entitled to a single farthing. If she comes to your house again, show her the door and tell her to do her worst. In point of fact, she cannot do anything at all."

Now this shows what extraordinary ideas prevail on the subject of a parent's rights over a child, for my friend, who is a highly educated woman, was quite under the impression that the mother of her servant had a perfect right to make the demands she made, and to carry out her threat of taking away her daughter. We read sometimes in the biographies of famous men, how these men, when young, were compelled by their fathers to enter some trade or business utterly distasteful to them, and to sacrifice their strong inclination for some particular line of life. There is a great engineer, now living in London, who was compelled by his father to be apprenticed to the drapery business, though he (the son) declared that as soon as he was twenty-one he should throw it up and become an engineer. The which he did. Opinions may differ as to the *moral* right of that father, but it is certain he had no shadow of *legal* right for his action. If the boy had known it, he could have absolutely refused to enter the draper's shop, and could have applied himself to engineering in his youth. But he did not know, and his father did not know, for when the son declared his intention of throwing up drapery at twenty-one, his father told him he could do what he liked when he was twenty-one. "Till then," he said, "you will do as I like." How many fathers, I wonder, have



used the same expression? And how many have thought that in using it they had the law on their side?

IN SCOTLAND, on the other hand, the child's earnings, so long as he remains at home, belong to the father absolutely; and in return for this the father is bound to supply the son with food, clothing, lodging, and education. This is dealt with on a subsequent page (p. 65) in treating of the duties of parents. And a Scottish parent has rather more right than an English one in the matter of controlling the child's choice of business or profession.

I say rather more, because the Scottish father has *some* control, while the English father has *none at all*, in law. If an English boy at the age of sixteen or even younger wants to go to sea, or to go on the stage, or to adopt any other calling distasteful to his father, the latter has no legal right to stop him, and the youth does not, in law, incur any liability or loss through his disobedience.

But in Scotland, where the duty of the father to his children is so much heavier, the rights are somewhat greater. A Scottish boy who refuses to follow the trade or profession which his father wishes him to adopt, loses all claim on the father for support, except, perhaps, for a mere pauper's allowance. Thus, if Mr. Grant, of Edinburgh, wishes his son to be an engineer, and the boy obeys, the father will be obliged to support the lad until he is properly trained for the profession of an engineer. But if young Grant refuses to be an engineer, and "gangs his ain gate" to the medical school, with a view to becoming a surgeon, he must support himself. Still, there is no way in which the father can compel the lad to obey him and become an engineer. So that the penalty for filial disobedience is *negative* only, and not *positive*—that is, it is the deprivation of a benefit, but not any actual infliction of a punishment.

**The child's marriage.**—Both in England and Scotland a marriage by a person under twenty-one is valid, even although it takes place without the consent of the parents. Formerly, it was not so in England, where the marriage of an infant, that is, a person under twenty-one, without the consent of his or her parents or guardians, was invalid. Such a state of the law led to very great scandals. It was no uncommon thing for a man under age to marry, making a false declaration that he was over twenty-one, and then, after living with his supposed wife for many years, to turn round and inform her that she was only a concubine and her children were all bastards.

The law had been passed to prevent designing women and fortune-hunting and unscrupulous men from entrapping silly young men and romantic maidens into clandestine marriages for the sake of their money; but the remedy proved worse than the disease. At last the attention of Parliament was called to the matter by the action of the Marquis of Donegal, who threatened to bring a suit to have his marriage declared null and void on the ground that he was married under age and without the proper consent. The result was an Act\* to repeal the old Marriage Law, and to substitute a means whereby fortune-hunters of both sexes might be deprived of the fruits of their industry, but without the painful consequences of the former statute. The result of Parliamentary interference was that IN ENGLAND the consent of the father (or, if he is not living, of the mother) is required

\* *The Marriage Act, 1823.*

to the marriage of an infant child. If such child does not obtain the requisite consent, and marries, the marriage is quite legal ; but the parent whose consent ought to have been asked has a means of punishing the fortune-hunter. The way to do it is this : Not more than three months after discovering the clandestine marriage, and within one year of that event, the parent *may* begin an action in which he asks the High Court of Justice to tie up his child's property so that the other party to the marriage cannot by any possibility come into possession of any of it. Thus, suppose a daughter of nineteen has eloped, and married without her father's consent, on March 1st, 1896. The father finds out on June 1st, 1896. On or before September 1st the action must be commenced. It cannot be commenced after ; because it is more than three months after the marriage was discovered. The judge will make an order that the young lady's property shall be tied-up, so that she receives the income for her life, and after her death her children, if she has any, will take equal shares. If she dies without any children, her relations will have the money. Thus the husband is quite cut off from any share of his wife's property, and if he married her for her fortune he will be suitably disappointed. If, however, the young people can keep their secret until after February 28, 1897, the father has no right to interfere, because, as I said, the action, must be begun, if at all, within twelve months of the marriage.

But there is a way of *preventing the marriage* of a minor. No one can be married in England except by banns, notice, common license, or special license. Marriage by **banns** is where the parties give notice to the clergyman of the parish in which they reside, and he reads such notice out in the church on three consecutive Sundays. Marriage by **notice** is where the parties give notice to the registrar of marriages for the district in which they live, and he puts up the notice in his office for three weeks. Marriage by **special license** is where the parties obtain a license from the Archbishop of Canterbury, allowing them to be married without giving notice to the registrar and without banns. In all these cases the father of the intended bride or bridegroom can, if he hears of it in time, stop the marriage by giving notice to the clergyman or registrar that his child is under twenty-one and has not obtained his consent. He can even go at the last minute to the place where the wedding is taking place and stop it. No clergyman, minister, or registrar dare proceed with the marriage of an infant if that infant's father (or mother, if the father is dead) makes any objection, for to perform the ceremony in the face of such an objection is a criminal offence.

The mother's right to the custody of her children is a subject that has received considerable attention during the past fifty years. Before 1886 the mother's right to the custody and guardianship of her children was not very considerable. As I have shown, her only claim as against the father was to have the custody of or access to children under sixteen when she was divorced from her husband or living apart from him owing to his fault.

In one respect she laboured under a distinct grievance, for the husband could by his will appoint an utter stranger to be guardian of his infant children, and this guardian had absolute control over them, and could remove them altogether from their mother's care and training. It is wonderful, when you think of it, that a law so full of outrage to maternal feeling should have been allowed to remain on



the statute-book from 1660 to 1886 ; but so it was. Now, however, *on the death of the father*, the mother becomes the legal guardian of all children under twenty-one. The father can still appoint a guardian by his will, but that guardian acts along with the mother and not instead of her. If the father appoints no guardian, the mother has the sole right.

By the same Guardianship of Infants Act, 1886, a still more extensive right was conferred upon the mothers of infant children. **A mother can now make a will and appoint a guardian of her children.** The Act works out in this way :—(1) *If the father is still alive*, the mother's guardian cannot act unless he goes to the Court and shows that the father is unfit to have the *sole* custody of the children. (2) *If the father is dead* and has appointed no guardian, the mother's guardian will act alone. (3) *If the father is dead and has appointed a guardian*, the mother's guardian will act jointly with the father's.

I want you particularly to observe the fact that although a father has an absolute right to appoint a guardian to act along with the mother, a mother has only a conditional right to appoint one to share the control with the father. The condition is that the father is unfit to be the sole guardian, and the Court will only allow the mother's guardian to be appointed when such a course is shown to be necessary for the protection of the children. My own experience has been that the mother's nominee has always had to show a very strong case. For instance, it is not enough to prove that the father is a bankrupt, nor that he ill-treated his wife, nor even that he once committed adultery. But it is enough to prove that he is a *confirmed* drunkard, or has been *several* times convicted of crime, or has neglected or ill-treated *the children*, or *is* living an immoral life.

IN SCOTLAND the rights of the mother to be guardian of her infant children (tutor it is called in Scots law) are precisely the same as in England, and she has the same power to appoint someone to act after her death, for the Guardianship of Infants Act, 1886, applies to both countries alike.

**Children's rights in their dead parents' property.**—In dealing with this branch of my subject we shall see how radically different are the laws of England and Scotland.

#### IN ENGLAND

a father and mother can make a will and leave their children nothing. Therefore, if the parent make a will the property will go as he directs. I daresay many of you can recall instances of wealthy fathers who have brought up their children in luxury and idleness, and have then, in a fit of temper, or a moment of caprice, or for some reason even less worthy, disinherited them. Such cases come before lawyers nearly every day. It is only the other day that a millionaire left a million and a half of money to his mistress and illegitimate children, and only about one-fiftieth part of that sum to his lawful family. His wife was left out altogether. I know of a rich manufacturer in the Midlands who gave property worth £200,000 to a woman of bad character and left his three sons penniless. In this case the matter was aggravated by the circumstance that the unnatural father had brought up the young men without educating them for anything whereby they could make a living.

It is only *when there is no will* that the children have any right to the property of a deceased parent. In considering the extent of this right we must treat *freehold land* separately from *other property*. We must also distinguish between cases where only one parent is dead, and cases where they are both deceased.

**The eldest son is entitled to all the freehold land ;** but he must measure off one-third of it for his father's widow during her life, as I have stated in the first chapter (p. 33). If the eldest son is dead, leaving children, the latter will step into their father's shoes. But if he leaves no children, the second son will take the land ; and if he is dead leaving no issue, then the third son ; and so on, until the sons and their children are exhausted. Then come the daughters. Now the rule about them is different. The eldest daughter has no better right than the others—the rule being that **females inherit land equally together.**

Take an instance. Mr. Smith dies intestate, leaving six freehold houses. His wife survives him. He had three sons—(1) Thomas, (2) William, (3) John ; and three daughters—(1) Mary, (2) Jane, (3) Elizabeth—this being the order of their birth. Thomas died before his father, leaving a daughter, Sarah. The property will be divided thus : Mrs. Smith has two of the houses for her life. Sarah Smith takes her father's place, being his only child. Her father, as eldest son of Mr. Smith, would have been entitled to the houses. Therefore Sarah Smith is entitled to the houses.

Suppose Thomas Smith had died without children : William would have been heir. And if Thomas and William had both died childless, then John. If all three were dead without issue, their sisters, Mary, Jane, and Elizabeth, would have come in equally—that is, they would have been entitled to the four houses between them until Mrs. Smith's death ; and when that happened, to the other two—making two houses each.

When people are entitled to share property in this way, they can either partition it—as in the above case would be easy, two houses each—or sell it all and share the money. If two out of the three want to sell, the other will be *forced* to agree to that course. But if two out of three want to divide, the third can only *insist* on a sale if she can show good grounds for it.

A case once actually happened where two sisters inherited one house from their father. One wanted a sale, but the other stuck out for a partition. As the law then stood, the judge was bound to order partition. He could not force the obstinate lady to sell against her will. Accordingly, an officer of the court went down to share up the house. He found there was only one door and one chimney, so he allotted the door to one and the chimney to the other. Thenceforth one of them could not have a fire, and the other could only go in and out by the window. After a fortnight of it the two came to terms and lived happily together.

If such a case occurred now, the judge might, and certainly would, order the house to be sold and the proceeds to be divided.

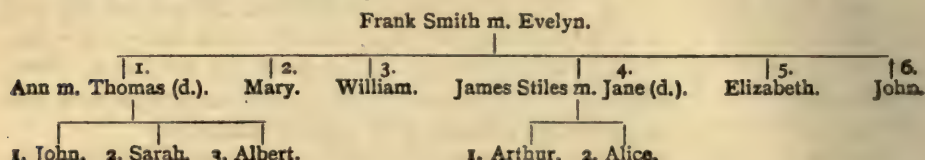
**As to other property, not freehold land,** the principle of distribution is quite different. The widow takes one-third absolutely, and the remainder is *equally* distributed amongst the children *without distinction of age or sex*. A son takes no more than a daughter, and an elder child no more than a younger one. Thus in the case of Mr. Smith (above)—if he had £3,000 in cash or securities or



leasehold land, Mrs. Smith would take one-third (£1,000), and the six children would have the £2,000 equally amongst them. If one of the children was dead, leaving issue, his issue would take their father's or mother's share.

A few tables will, perhaps, give a clear idea of how to distribute family property. Mr. Frank Smith dies. He has six freehold houses, £1,000 in the bank, £1,000 worth of consols, and a leasehold house—the lease of which is worth £1,000.

This is the state of the family:—



(d.) = died before Frank Smith.

(m.) = married.

### I. The freehold land.

(a) Evelyn Smith (the widow), one-third for life=Two houses.

(b) John Smith (eldest son of Thomas)=Four houses now, and the other two when his grandmother dies.

II. The other property must all be turned into money. Sell the lease and the consols, which will raise £1,000 each, and there will be £3,000 for distribution.

						£	s.	d.
(a) Evelyn Smith (widow)...	...	...	...	...	...	1,000	0	0
(b) Mary Smith ...	...	...	...	...	...	333	6	8
William Smith ...	...	...	...	...	...	333	6	8
Elizabeth Smith ...	...	...	...	...	...	333	6	8
John Smith ...	...	...	...	...	...	333	6	8
John Smith -	£111	2	2½	} Share of Thomas Smith		333	6	8
Sarah Smith -	111	2	2½					
Albert Smith	111	2	2½					
Arthur Stiles	£166	13	4	} Share of Jane Stiles	}	333	6	8
Alice Stiles -	166	13	4					
						£3,000	0	0

You observe that Jane Stiles's husband gets nothing, neither does Thomas Smith's wife.

IN SCOTLAND, as I have said, the law as to the rights of children in their deceased parents' property stands on a basis quite different from the English law. The policy of the Scots law is against the notion that a man should be able to leave his wealth to strangers and cut off his own offspring with little or nothing. But even here there is a difference between land and other property. By the law of Scotland, property is of two kinds—Heritable and Movable. *Heritable* property comprises land, and all houses, buildings, trees, fixtures and other things so planted in or fixed to land that they cannot be separated from it without damage. *Movable*

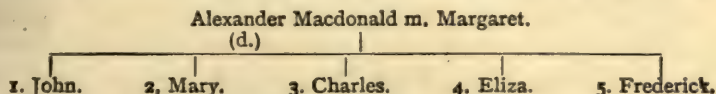
property comprises everything else : such as money, stocks and shares, furniture, and, in fact, everything not land or fixed to or connected with land.

Now with regard to **heritable property**, the father or mother has the same right as an English parent. He or she can make a will, and give the property away to anyone at pleasure. It is only when there is no will that the children have any rights at all.

Suppose, however, a Scotsman dies without making a will of his heritable property, the rules are very much the same, if not exactly the same as in England. That is, *the eldest son* has, or if he is dead, his children have, the first claim. If he is dead without children, then the second son or his children come in ; and so on through the sons. The sons and their children all have a prior claim to any of the daughters ; and an elder son has a better right than a younger.

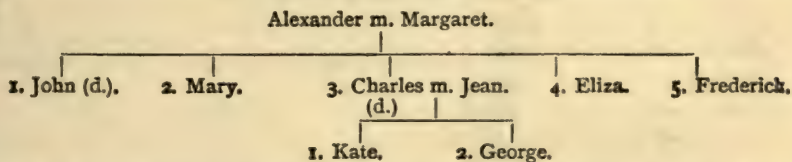
But if there are no sons, or if all the sons are dead and childless, the daughters come in. Here, again, the daughters take equally. There is no legal preference for an elder daughter over a younger. A table or two will make the matter clear. Alexander Macdonald is the father who has heritable property :—

I



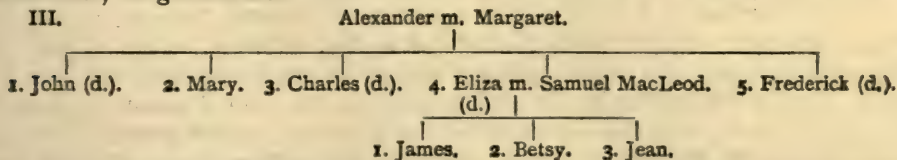
John is entitled to all the heritable property, out of which (as I stated on p. 35) he must pay his father's widow (Margaret Macdonald) one-third of the rents for her life.

II.



John being dead without children, you go to the next *son*, Charles. He is also dead, leaving Kate and George. George inherits all the heritable property of Alexander, his grandfather.

III.



Here all three sons are dead without leaving any children. Eliza is dead, leaving three children. Suppose the property consists of six houses : Mary will have three of them, and Eliza's son James the other three, because he, as his mother's eldest son, represents her, and takes the share she would have taken had she been alive.

**Movable property** is on quite a different footing. In this case the father *cannot, by his will, deprive his children of a share*. Perhaps I should say that he cannot do this directly. Indirectly he can ; for all he has to do is to invest his money in land, and then he can make a will and leave his children out.

When the father of a family dies, leaving a widow and children, his movable



property is divided into three equal parts :—(1) the widow's part ; (2) the bairn's part, or legitim ; and (3) the dead's part. It is only the last-mentioned of these that can be disposed of by will so as to exclude the widow and children. To take an example :—Alexander Saunderson has £3,000 in movable property. He also has a wife and four children—John, James, Margaret, and Mary. Now Alexander makes a will, saying, "I leave all my property to the Glasgow Royal Infirmary." In England, the whole £3,000 would go to the Infirmary, and Mrs. Saunderson and the children would not have a penny of it. Not so in Scotland. The property goes this way :—

### £3,000 Movable Property.

Mrs. Saunderson (widow's part)	...	...	...	---	£1,000
John	...	...	£250	} Bairn's part	---
James	...	---	250		
Margaret	...	...	250		
Mary	...	...	250		
Royal Infirmary, Glasgow (dead's part)	...	---	...	---	1,000
					<u>£3,000</u>

If Mr. Saunderson, the deceased, left no widow, the thing is a little different ; for the children are then entitled to one-half instead of one-third. Therefore the distribution would be :—

### £3,000 Movable Property.

John	...	...	£375	} Bairn's part	...	---	£
James	...	---	375				
Margaret	...	...	375				
Mary	...	...	375				
Royal Infirmary, Glasgow	...	...	...	...	---	---	1,500
							<u>£3,000</u>

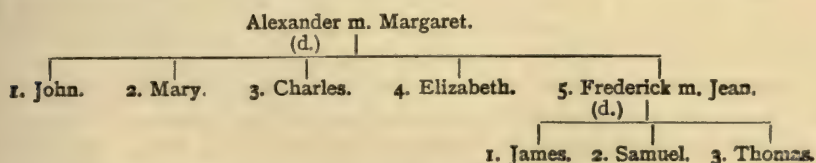
**How the right of a child to a bairn's part may be lost.**—The right of a child to legitim, or bairn's part, of movables of a parent can only be lost in one of two ways. One is *by the father and mother, before marriage, making an agreement*, by which the father makes a settlement on the children who may be born. By this I mean that the father sets aside a certain sum of money, or certain property, in such a way that he cannot spend it or sell it, which property is to go to his children after his death. Thus, the father will perhaps give to a trustee five debenture stocks in the Caledonian Railway. The trustee becomes the owner of these stocks ; but he is to pay the dividends to the father so long as the latter lives ; and after his death to sell the stocks, and share the money amongst the children. But in the contract by which this is done, the father must *expressly* state that this settlement is instead of legitim (bairn's part). If he does not, the children will be entitled not only to their share of the stocks, but also to a bairn's part as well.

If he does declare it, however, and the mother agrees to it, the children have no claim except for their share of the stocks. This kind of arrangement is

frequently made for two reasons—(1) to set aside something for the children of a marriage independent of the extravagance or misfortune of the father ; and (2) to prevent the children from having any legal right to bairn's part. The first reason is a very strong consideration with many people ; and it is a common thing for the young lady's parents to tell the aspiring bridegroom that he must make some provision for whatever family there may be. For the effect of a "settlement," as such an arrangement is called, is to create a fund which the husband cannot touch, and out of which the children *must* get something, even if their father dies a bankrupt.

The second way in which a child may become disentitled to share in his father's property after the latter's death is *by accepting something instead of it* during his lifetime. Very often a father would rather give his son the portion he intends to give him, in order to start the son in life. For instance, a father with five children, and having means to the extent of a thousand pounds, may say to a son, "You want to start in business, and your share of my fortune will be more useful to you now than if you wait till I am dead. I will give you £200 now, but on condition that you do not claim any share of my property at my death." The son is not bound to accept ; but if he does, he takes the money in full settlement of all his claim to "bairn's part." In such a case, the property which the father has at his death will be divided between the other four children.

When the father makes no will of his property, the distribution is almost the same as in English law. I have already dealt with the Heritable ; now I come to the Movable. The *widow* has her third, in the first place. Then come the *children, who take equal shares* ; and if one of them is dead, leaving children, such children succeed to their parent's share.



The inheritance (say £3,000) will be divided thus :—

Margaret (widow), $\frac{1}{3}$ =	...	...	...	...	£1,000
<i>Bairns' Part</i> (£1,000).		<i>Dead's Part</i> (£1,000).			
1. John	$\frac{1}{4}$ of £1,000 =	£250	$\frac{1}{5}$ of £1,000 =	£200	... 450
2. Mary	"	250	"	200	... 450
3. Charles	"	250	"	200	... 450
4. Elizabeth	"	250	"	200	... 450
5.	<div style="display: flex; align-items: center;"> <div style="margin-right: 10px;"> <math>\left\{ \begin{array}{l} \text{James - } £66\ 13\ 4 \\ \text{Samuel } 66\ 13\ 4 \\ \text{Thomas } 66\ 13\ 4 \end{array} \right.</math> </div> <div> Share of their deceased father, Frederick ... .. 200 </div> </div>				
					— £3,000

The duties of children to parents is the next subject to be considered. As far as ENGLISH LAW is concerned, there is very little to be said. In fact, the only legal duty of an English child to his parents is that imposed by the



**Poor Laws**—namely, of contributing to their support when they are *unable to work and so poor as to be a charge on the parish*. As in the case of the parent who is bound to contribute to the maintenance of an impotent pauper child, the only person who can take action in the matter is the parish officer. It must also be noted that the child is not obliged to contribute unless he has more than enough to maintain himself, his wife and family in the necessities of life. And it must further be observed that a millionaire with indigent parents cannot be compelled to make them an allowance of more than enough to keep them from starvation. I may add that the obligation is the same between grandparent and grandchild as between parent and child.

IN SCOTLAND the law rests on quite a different basis. There the child is bound to support his indigent parents according to his means if he (the child) has more than enough to maintain himself, his wife and children. The parent, too, is not obliged to go to the parish officer and ask that official to enforce the filial obligation. He can himself bring an action against the child for “aliment”—that is, an allowance which will enable him to support himself above want, according to his position in life and according to the means of the child.

**Cursing of parents.**—There is one piece of old Scottish legislation, now practically obsolete, which shows how the Scots of auld lang syne enforced filial respect. In 1661 a Statute imposed the punishment of death on any child who, being above the age of sixteen and in his right mind, should beat or curse either of his parents. The death-penalty is now removed, and the offence is punishable by fine or imprisonment. The origin of the law is no doubt to be found in the Bible, for there we read in the Law of Moses that whosoever cursed his father or mother should be stoned to death. Almost all ancient nations, except the English, punished offences against parents with great severity. Ingratitude to a father was a crime by the Roman law; but most modern codes make no difference between offences against a parent and offences against a stranger.

**Seduction of a daughter.**—When a daughter living at home is seduced, she has no right of action against the seducer, because she has consented to her own undoing. But her father, in whose household she dwells, can bring an action for damages in certain circumstances. These circumstances are—(1) that the girl *was living at home*, both when she was seduced and when she was confined; (2) that she was in the habit of *doing some service* at home. The service may be very slight—it was held sufficient in one case when the daughter's only work was to pour out the tea in the afternoon. Some service is essential, because by law the action is one for loss of service. But although such loss of service must be proved, the jury who award the damages are not confined to the value of the lost service. They can give what is called “sentimental” or “exemplary” damages, which will vary according to the view they take of the seducer's conduct, and these damages belong to the father. If the father is dead, or the daughter is an illegitimate child, the mother can bring the action.

It should be understood that the parent, as such, has no right in this respect. If the daughter who was seduced was living in service at the time, the parent has no remedy, nor if she was living with a relative or friend, or in lodgings. But if she is in such service that she comes home to sleep, or even comes home

occasionally—say once a week, or once a fortnight—and while at home she is in the habit of doing something for her parents, the loss of this occasional service is enough to give the parent a right to damages against the seducer.

Again, mere seduction (*i.e.* carnal knowledge) without the subsequent birth of a child is in no case an actionable wrong, however reprehensible it may be from a moral point of view. The reason is that the father does not suffer any loss of service, as he does when his daughter is confined of a child.

**Taking a child away from its parents** is an offence under the criminal law, if the taking was for an immoral purpose; but it is not a matter for which a parent can obtain damages. If a young child is kept away from its father or mother, there is a quick remedy, known as a "Writ of Habeas Corpus." Habeas corpus, as we have already seen (p. 31), means "have the body"; and the writ commands the defendant to have the body of the child in the Court on a certain day at a certain hour, in order that a judge may decide who ought to have the custody. Cases in which this remedy has been used are such as the following: When the father has agreed to hand over a young child to a charitable institution to be educated, but afterwards he has changed his mind, and the Institution has refused to give up the child; where the grandmother on the mother's side has taken charge of an infant whose mother died in child-birth. In any case, in fact, in which a third person has possession of an infant (under twenty-one) and refuses to give up possession to its father, the father can demand his child. If the father is dead, the mother or other guardian has the same right.

**The parent's liabilities for the child.**—A father is not in any way responsible for his child's debts, no matter how or for what purpose they are incurred. Neither is a father responsible for the consequences of his child's wrongdoing. I daresay many of you who are fathers have had claims made on you as a result of the boyish escapades of your sons. "Your boy Tommy has broken my window, and you must have it mended," is the sort of way these claims are made. And probably you have paid it, and mentioned it to Tommy afterwards in a more or less forcible manner. Let me tell you, for your consolation, and also for your guidance in the future, that you were not in any way *legally* bound to pay.

Still, if you had been obdurate, the neighbour could have made matters lively for you. He could have summoned Master Tommy before a magistrate for wilful damage; and if the magistrate thought the boy did it on purpose, he could have imposed a fine. Then if *someone* did not pay the fine, poor Tommy would have been sent to prison. So perhaps it was as well that you paid for mending the window, after all. But be it remembered that the neighbour would have had to prove that the boy broke the window wilfully. If it was a mere accident, such as driving a cricket-ball with a little extra force, there would be no case for a summons.

**Duties of parents.**—By the LAW OF ENGLAND the three great duties of parents to their children are—according to Blackstone—maintenance, protection, and education.

**Maintenance.**—By the law of England there is no direct duty on either father or mother to maintain a child. By this I mean that in no case can a child bring an action against his parents for maintenance. This was decided one hundred and



fifty years ago in a case where a Jew had turned his daughter out of doors because she had embraced the Christian religion. The parish authorities summoned the father for an allowance to maintain the girl, who was eighteen years of age, and the magistrates made an order against him. But he appealed to a higher Court, which quashed the order, and laid down the law that "no person is obliged to provide a maintenance for his issue unless where the children are impotent and unable to work." This does not mean unable to *obtain* work, but absolutely incompetent from some physical or mental infirmity. Thus if a son or daughter meets with an accident and is confined to bed, the father and mother, if they have any means at all, are liable to provide a maintenance. If the injury is of a permanent character, the allowance for maintenance would be permanent. If the injury is only temporary, the allowance will be temporary also. If a child becomes lunatic or insane, the same rule applies.

It should be observed that this duty of maintenance is quite irrespective of the age of the child. It applies when the child is grown up as much as when he is an infant. Another point to be noticed is that the *child* cannot summon the parent for such an allowance; but if he becomes a charge on the parish, the poor-law guardians are bound to take action. There is, however, a law whereby **parents are indirectly enjoined to support their young children.** If any parent wilfully neglects to provide adequate food, clothing, medical aid, or lodging for his child, being under the age of fourteen years, whereby the health of such child is seriously endangered or injured, he is guilty of a criminal offence.

Another case in which a parent may be compelled to maintain his child, even though the latter is not "impotent and unable to work," is when the parents have been divorced. In this event, the judge who grants the divorce or judicial separation generally makes some sort of an order to provide for the children of the marriage. If it is the husband that is the guilty party, he will be ordered to make provision for the children, either by an allowance out of his income or by setting aside part of his property, which will be invested for the children's benefit. But any compulsory allowance of this kind will stop as each of the issue attains twenty-one years of age. If it is the wife that is guilty, she will not be ordered to make an allowance out of any income which she may earn; but if she has any property settled on her, the judge of the Divorce Court may, if he thinks proper, compel her to set aside part of it for the issue of the marriage.

At one time in England there was no legal duty of any kind on a married woman to support her children. But the Married Woman's Property Act, passed in 1882, altered the law in this respect. I have already shown (p. 23) how it made a married woman having separate property liable to maintain a pauper husband. The same section of the Act places upon her the same burden of supporting her children that is on the other parent.

The **protection** of a child by its parents is a duty recognised by the law; but it is only *enjoined*, not enforced. The law says: "We cannot compel you to protect your children, but still we hold it to be your duty to do so, and we will help you as far as possible." That is why it is legal for a man to do in defence of his child whatever would be lawful for him to do in self-defence. Thus, if he sees his son or daughter being assaulted, he is justified in repelling the attack by force. For

that purpose he can use whatever violence is necessary, but he is not justified in using more than is reasonably sufficient to repulse the attack. Thus, where the child is being hit with the fist, the parent may use his fist or even a stick to compel the aggressor to desist. He would not be held justified in using a knife or a gun. But if he saw his offspring in danger of being shot or stabbed, no legal blame would lie at his door if he set on the wrong-doer with whatever weapon was to hand.

When one has said so much about the parent's duty of protection, one has said all. There is no punishment for a father who does not protect his children; and, indeed, it is one of the characteristics of the English law of parent and child that there are very few positive duties imposed on either side.

As to the third duty, that of **education**, I cannot help thinking that Blackstone was wrong when he put this down as a parental duty—that is, a parental *legal* duty. It was, of course, a moral duty, and the parents would be assisted by the law in controlling the child for its own good. Thus, as I have shown, the father who whipped his son for disobedience to reasonable commands, or for breaches of good morals, was always guiltless of assault; but in ordinary circumstances, the duty of education was really not enforced by the law except in one case. That case was when the parents were divorced or judicially separated. Here the father would be compelled to send the child to school according to his position, and even to a University if he (the father) were a man of means; so that the children of divorced parents would be in one sense better off than the issue of a marriage that had not been dissolved by the Courts. And at the present time we often hear in divorce cases of applications by one party or the other that the children shall be placed in proper schools, and the father be ordered to bear the expense.

Until Mr. Forster's Education Act of 1870, however, there was no way, except in the unhappy matrimonial circumstances that I have mentioned, of compelling a father to send his children to school. There are now living hundreds of men in England, especially in the manufacturing towns of the North, whose learning was wholly acquired in night-schools and Sunday-schools. Before they were out of the age of merest infancy they were sent to work all day in the cotton-mill or wool-factory; and it speaks volumes for the pluck and determination of the working-classes of Britain that they acquired the rudiments of education in the only hours they had of leisure.

In 1870 was passed the Elementary Education Act, and it was followed by others in 1873 and 1878. The effect of these Acts, so far as they relate to the duties of parents, is to compel every parent to send his child to school until such child has received the rudiments of learning at least. If the parent of any child **over five years and under fourteen** neglects to provide elementary instruction for that child, he may be summoned before the magistrates on the complaint of the local educational authorities; and the magistrates have power to order the child to attend some elementary school, the choice of which is left to the parent. If a parent persistently refuses to enforce regular attendance at school, he may be punished by a fine. Most, if not all, School Boards appoint inspectors whose duty it is to make inquiries about children who do not attend school regularly, and to



issue summonses against parents who break the law. There is a good deal of misconception about the rights of these inspectors and the effect of the compulsory education clauses. In the first place, an inspector has no right to ask questions as to whether the child is attending school or not—or, at least, no one is obliged to answer such questions. I mention this because I have heard of people being considerably annoyed by over-zealous officers of this kind, who are apt to assume the office of inquisitor upon very slight provocation.

Then, again, **no parent is compelled to send his child to school** if he does not want to. The Act of Parliament only gives the magistrates power to interfere when the parent does not *provide education* for his children. Not a few people think that the Act obliges them to send the child to school; but there is nothing to prevent a parent from giving the instruction himself if he wishes to. The point is that the child must be instructed, and the law does not in the least care how or by whom that instruction is bestowed. It is no part of my business in this book to treat of the subject of education in general, or I might write a very practical dissertation to show the advantage of school life over private tuition. My business here and now is to tell parents of their legal rights, duties, and liabilities; and I am, therefore, constrained to say that while it is the duty of the parent to see that his children receive at least an elementary education, it is his *right* to educate them himself if he thinks fit.

**A point for working men, English and Scottish.** There is one way, however, in which it is better for a workman to send his children to school instead of teaching them at home. A child eleven years old may be sent to work as a **half-timer** if he has passed a standard required by the local bye-laws. A half-timer is a boy or girl who works either for half a day every day, or else for alternate whole days. In other words, a boy may work every morning or every afternoon, or else he may work all Monday, Wednesday, and Friday (or Tuesday, Thursday, and Saturday). Now, a child cannot be allowed to work half time unless he goes to school the other half time. That is, if he works every morning, he must go to school every afternoon. If he works one whole day, he must go to school the next.

When the child is thirteen years old, and has passed the standard fixed by the local bye-laws (generally IV. or V.) he may work full time. But if he is unable to obtain a certificate of proficiency, or of previous due attendance (250 times) at a certified efficient school, he cannot work full time until he reaches the age of fourteen. The liability of the parent as to sending his children to school for whole or half time may depend to some extent on the local bye-laws, a copy of which should be obtained at the School Board office. Not only is there a penalty on parents who allow their children who have not passed the standard to work full time before they reach fourteen, but there is a penalty on masters who employ such children. The consequence is that employers of labour always ask a lad or a young girl to produce a certificate of birth (obtainable for this purpose at the office of the registrar of births, for sixpence); and, if the child is between eleven and fourteen, a proper certificate of having passed the standard, or exemption on the ground of previous attendance, is the next thing asked for. Orders may also be made by magistrates sending children to industrial schools until the age of sixteen. The law may be summed up in

this way :—Parliament says, “Every child must receive the rudiments of education. At the same time we do not want to make the burden of a poor father any heavier than we can help. Therefore, we will make it to a father’s interest to look after the education of his boys and girls when they are young, by enacting that they shall be allowed to go to work at thirteen if, and only if, they have had a fair chance at school. But if the father has not looked after their education in their early life, he shall not be allowed to get rid of his burden of keeping them for an additional three years.”

BY THE SCOTS LAW the father is under an obligation to support, clothe, and educate his children, an obligation far more extensive than in England. The kind of support, clothing, and education he is bound to supply varies according to the father’s rank in life. Thus, a millionaire will be bound to supply better food, clothing, lodging, and education to his sons and daughters than a working man with thirty shillings a week. In England this is not so, as I have shown, for south of the Tweed it is enough if any father sends his child to an elementary school—a Board School, for instance—and does not endanger his health, while he is under fourteen, by allowing him to go without food, clothing, and medical attendance. But the food, clothing, etc., do not vary according to rank. A millionaire is legally entitled, in England, to dress his son in second-hand corduroys, and feed him on the coarsest food, so long as he gives him enough to keep him from starvation. And again, in England, if the father neglects these duties, the son can only complain to the parish officer, who will take out a police-court summons against the parent.

But the Scots law, which is, as I have shown in the previous chapter, more strict as against a husband in favour of the wife, is also far more strict in favour of a child as against the parent. Perhaps the law of the Scottish Courts will be best understood from an illustration taken from a case which occurred in 1885. A Mr. Smith, of Falkirk, had educated his son at the Universities of Edinburgh and Oxford, and then sent him to London to qualify for the English Bar. When young Mr. Smith was duly called to the Bar, the briefs did not “come trooping gaily,” his voice was not heard in the Courts, nor did solicitors seeking his opinion tumble over one another on the steps of his chambers. In short, he found himself in the ranks of the briefless. To add to his woes, his father stopped the allowance he had hitherto made ; whereupon the son brought an action in the Court of Session for an allowance (called in Scots law *aliment*) of £250 a year. The young barrister said, with some degree of truth : “You have sent me into a profession where you knew I should have to wait a long time before I could earn a decent livelihood suited to the station in which I have been brought up. It is, therefore, your duty to maintain me until I get work.”

To this the father replied : “I have given you a liberal education, have paid your fees, and started you in a profession ; you are sound in body and mind, and able to work. Earn your own living. If you really cannot obtain work, you may come and live at home in Falkirk. I cannot afford to continue the allowance I made when you were at Oxford.”

And the Court of Session upheld the father’s view of it. They laid it down that a child who had been fairly educated to a profession, and fairly started in the



world, must make his own way without further demands upon his father for assistance. But the judges were very careful to say that a father is bound to support his children—that is, to keep them from want. And what “want” is, depends upon the rank and position of the father and the son. In the case of Mr. Smith, the father relieved himself of all further liability by offering to *take the son into his house* and support him there. It would not have been enough for him to offer the son a starvation allowance just enough to keep him out of the workhouse.

For instance, where a gentlewoman claimed aliment from her father, and the father offered a few shillings a week, Lord Neaves said: “The defender [the father] urged that if any aliment were to be allowed, it should be the minimum, or pauper’s allowance. The pursuer [the daughter] has shown that she is a gentlewoman and not a labourer. She is, therefore, I think, entitled to such a sum as will secure her from want in that position. It is obvious that what would be a liberal allowance to a person accustomed to poverty would be privation to one of higher condition and less hardy habits.”

Two things should here be noted. (1) If the child though fairly educated and started in life afterwards becomes ill, physically or mentally, so as to be *unable* to work, the father’s duty of support revives. (2) The duty to support is quite irrespective of the child’s age. He may be fifteen or he may be fifty. Thus, if a wealthy father has trained up his son as a gentleman, without setting him to any trade, business, or profession, he must support him, and cannot afterwards turn round and say: “Go, work. You are strong and hearty, and I will not keep you any longer.” IN ENGLAND he could say this. I know one case where a landed proprietor of great wealth brought up his eldest son in idleness. The son had an average amount of natural ability, but was always brought up to believe that he was to succeed to the land, and there was no need for him to work. But one fine day the father and son quarrelled, because the latter wanted to take a commission in the yeomanry, to which the father would not agree. Then the parent turned his son out of doors, and the young man found himself, at the age of thirty, completely ignorant of business, and without the slightest knowledge of how to get a living. In the end, after working as a navvy for about six months, he enlisted in the army, and is now, I believe, a non-commissioned officer in a cavalry regiment.

As I have said, this could not happen in Scotland. If the father had turned out his son there, he would have been *compelled* to make him a good allowance—say of £300 or £400 a year. In the case of Smith, the father offered to take his son back home, and so was not ordered to pay aliment. But when a father is a man of bad morals or of such habits that it would be injurious for the child to live with him, he will be compelled to make an allowance, and will not be permitted the option of offering the child a home under his roof.

A Scotswoman has far more claim on her parents for aliment than a Scotsman, except among the working and lower middle-classes. This is because as a rule the daughter of a workman or a small shopkeeper is trained to make her own living; while it is not so with the daughter of a well-to-do merchant, a lawyer, a doctor, a landed proprietor, or other person in that class of life.

**Parents’ Rights over Children’s Property.**—Sometimes infant children

have property of their own. Uncle Tom dies and leaves £500 to his nephew George, who is only ten years old. Now, Uncle Tom may have left it in one of three ways: (1) To trustees to hold in trust and pay George *when* he comes of age; or (2) to trustees to pay to George *if* he comes to full age; or (3) "to my nephew George," without appointing any trustees to take care of it. In the last case, as there is no trustee, George's father, being, as I said before, his guardian, will be a trustee to take charge of the money until his son is twenty-one.

In all the three cases the question is often asked *whether the interest of the child's money ought to be paid to the father* to meet the expenses of education, etc., or ought to be accumulated and added to the capital. The answer in the second case [(2) above] is in favour of accumulation, because George is only entitled to anything *if* he attains twenty-one.

But in the first and third cases he is entitled to the money now, though he cannot claim to be paid until he is twenty-one. Now, suppose George had no father, the interest on the £500 would certainly have to be paid for his maintenance and education during minority. The case, however, is altered when he is living at home with his father; because, the judges say, the father ought to maintain and educate his child out of his own pocket. Accordingly, the question for consideration is, "*What are the means of the father?*" Not, "What is the fortune of the child?" If the father is in such needy circumstances that he cannot maintain the infant in such a condition or give him such an education as the child's future station will render advisable, the interest on the child's money, or some of it, will be allowed to the parent to defray expenses.

Take, for instance, a case such as came under my notice quite lately. There were two brothers living in a North of England town. When they were children they received a very elementary education, and went to business at the age of fourteen. In five years, one of them found the life of a clerk too monotonous for his tastes, and so he emigrated, South America being the spot selected as a hunting-ground for a fortune. Twenty years later the adventurous young Englishman found that he had "made his pile," and so he hied him back to England, home, and beauty. There he found his brother, still a clerk in the same office, with two pounds a week as wages, married, with several children. To one of these the rich uncle took an immense fancy, promised to adopt and educate him, and hinted at leaving him a fortune. To cut a long story short, the returned wanderer did not spend his old age in the old country, for he died suddenly in less than a year after his home-coming. When the will was read, it was found that everything was left to the favourite nephew, and the brother of the testator was appointed sole trustee of the will.

Then the game began. The brother aforesaid, finding himself the trustee and his son the owner of a great fortune, began to launch out. He took a big house. He left his situation and did not apply for another. He began to drink good wine and to smoke expensive cigars, and generally to behave as though he were the owner of the fortune.

When the lawyers found out what he was doing they interfered. They told him the money all belonged to his son, and that *he* was not entitled to a penny of it. He then sent in a bill something like this:—



Mr. Hone's account against his son Thomas.

	£	s.	d.
To expenses of maintaining Thomas Hone for 13 years			
at £25 a year ... ..	325	0	0
Loss of time and trouble in connection with the same,			
say £10 a year (13 years) ... ..	130	0	0
	£455	0	0

The argument was, "My son has a lot of money, and is better able to pay for his keep than I was to keep him. Consequently, he ought to pay me for my trouble and expense incurred on his behalf." This father also demanded a sum of £500 a year for the future, for the trouble and expense of maintaining and educating his son.

The little account for past maintenance was not paid. The judge who dealt with the matter explained to the disappointed parent that his son did not owe him anything, because it was his duty as a father to support his child. As to the allowance for future expenses, it was cut down to £200 a year; and even this was only granted because the father was so poor that, without some allowance, he would not have been able to give the boy an education suitable to one whose position in life would afterwards be considerable. If the child's fortune had been only one or two hundred pounds, the father would have had no allowance at all, but the interest would have been added to capital and accumulated until the child attained majority. Or again, if the father had been a man of means, no allowance would have been granted, because it is a father's equitable duty to support and educate his children at his own expense. The principle upon which such allowances as I have mentioned are granted is, that it is for the child's benefit to make the allowance. If the father can support and educate the child out of his own pocket, there will be so much more interest to accumulate; but if the father cannot afford it, it is clearly better for the child to have a good education than a little extra money.

The law on this subject is practically the same both in England and Scotland, and in both countries, when the father is manager of property belonging to an infant son or daughter, he will have to render a strict account of it when that son or daughter comes of age.

Now let us consider what are the rights of parents in their children's property if the children die. And here we find slight differences between the English and Scots law.

IN ENGLAND, when anyone dies childless, the persons next entitled to his property are his parents. But there is a difference between freehold land and other property, and there is also a difference between the position of the father and that of the mother, very much to the father's advantage.

**As to freehold land.**—The father is entitled to the whole of it. But if the father is dead and the mother living, the mother will be entitled to the land *if there are no relations either male or female on the father's side living*. Just as in the case of children a male child is preferred to a female, so in the case of ancestors

those on the father's side are preferred to those on the mother's side. It seems hard, but it is a fact that a third cousin on the father's side would inherit your land in preference to your mother. So that for practical purposes it may be laid down as a rule that so long as the father or any of the father's relations are living, the mother cannot inherit her child's land.

**As to property other than land.**—When a man has no children and dies without a will, again the father is the first person entitled to the property, because he is the nearest relation, or, as lawyers call it, next-of-kin. But you may say, "My mother is as nearly related to me as my father." That is so, and years ago the mother's right was the same as the father's—that is, they took equal shares. However, by an Act of Parliament in the reign of James II., it was enacted that the mother should only have the same claim as a sister. This is how it works out: John Smith dies intestate and unmarried. He leaves behind a father, mother, two brothers (Thomas and James), and two sisters (Mary and Kate). The property consists of £1,000 in cash (or stocks, or shares, or anything which is not freehold land). The father will take the whole £1,000.

Now let us suppose that the father is dead; one would imagine that the mother would come next. According to all the rules of natural justice, she ought to; for she had as much trouble and anxiety in bringing up her son as the father had—perhaps more. She is as near in blood and affection as the father. But by the old Act of Parliament\* to which I have alluded, her rights are by no means equal with his. The money in the case I have mentioned will be divided thus: Mother (one-fifth), £200; Thomas (one-fifth), £200; James (one-fifth), £200; Mary (one-fifth), £200; Kate (one-fifth), £200. So you see that a mother, in the distribution of one of her children's money, counts the same as a brother or sister.

IN SCOTLAND the rules are very different; and here, again, we must draw a distinction between heritable and movable property.

**As to heritable property,** the Scottish father is not in such a favourable position as the English father. The latter always has first claim if his child has died without children; but in Scotland, brothers and sisters come first. Perhaps I can best explain the course of inheritance by an illustration.

Alexander Jamieson is a bachelor, possessed of a handsome tenement. His family consists of (1) father, (2) mother, (3) brother George (eldest), (4) sister Jean, (5) brother Charles (youngest of all). George will inherit the handsome tenement aforesaid. If George is dead, Charles will be the heir, though he is younger than Jean, because males are preferred to females. If both brothers are dead, Jean becomes heir. If, however, Jean also is dead, the father will take the tenement.

Suppose the father were dead, natural justice would suggest that the mother should have a claim. But the law of Scotland does not in this respect conform to natural justice. The father's relations—for instance, his brothers and sisters, uncles and aunts, cousins and nephews—can make a claim, and the one who is nearest in degree will have the tenement; but the mother has no claim in any case to the heritable property of any of her children, neither have any of her

\* *Statute of Distributions*, 1685.



relations. It seems very hard to exclude the mother in this way ; but any son who wants his mother to have his heritable property can, and if he be a prudent man will, make a will and leave it to her. The rule that I have laid down above only applies when there is no will.

As to movable property, the rules are simpler and more favourable, both to father and mother. When the father is living, he will take half the property, and the mother will have none ; but if the father is dead, the mother is entitled to one-third.\* This seems more just, and it is hard to understand why the mother should not have equal consideration in the matter of heritable property. The reader must remember that the laws relating to the inheritance of land both in England and Scotland are a remnant of the old feudal system. Under that system, every landowner was bound to render military service, and, consequently, females were excluded as much as possible, because they were unable to go forth to war in the time of the country's need.

\* *Intestates' Succession Act (Scotland)*, 1833.

## CHAPTER III.

### GUARDIAN AND WARD (SCOTS=TUTOR AND PUPIL), AND WARDS OF COURT.

The office of guardian—How guardians are appointed—Who may appoint a guardian—Protecting a child from its father—When the father and mother die without appointing a guardian—The religion in which a ward must be educated—Wards of Court—Marrying a ward of Court—Contempt of Court—Cheap in America, but not in England—The rights of guardians—More power than a parent—Custody—Education—Punishment—Obedience—Religion—Courtship and marriage of ward—Duties of guardian—Food and clothing—Ward entitled to comfort—The business of life—Marriage—When guardianship ends—Tutors—How appointed—The nearest male relation—Aliment—Education—The pupil's property—Liabilities of a tutor—His right to expenses—Curators—How appointed—Their duties—Giving caution for fidelity.

THE subject of guardianship is one that must be of interest to the family man. He will want to know the *powers and liabilities of a guardian*, in the first place, because he may have to appoint someone to be the guardian of his own children. He will want to know, in the second place, because he himself may at any time be asked by a friend to consent to be guardian of his friend's children; and he will find it difficult to refuse the office. As will be seen from a perusal of the following pages, that office is in many respects a thankless one. Like the cabin-boy on board ship, the guardian receives more kicks than half-pence—"Monkey's allowance," the sailors call it.

Yet it is a social duty to accept an office of trust of this kind. If everyone selfishly thought of saving himself all possible trouble and annoyance, and would not accept the duties and responsibilities of a guardian, one more misery would be added to the catalogue of human woes. The prospect of death is very terrible to a man with a young family. It would be still more dreadful did he not know that he was leaving the training of his children in the hands of trusted friends—men who would protect the dear ones in their youth, and train them in the paths of probity and honour.

One ancient nation, the Romans, whose laws, though made two thousand years ago, still form the model for legislation in the civilised world, thought so highly of this duty of guardianship that they made it one of the first obligations of a citizen. For in Rome, as far back as legal history carries us, a citizen who was asked to be a guardian of young children could not refuse to act.

In Great Britain, another course is adopted. Here, *guardianship is quite voluntary*. Any man who is appointed can refuse to act, because the judges and legislators have thought it might be bad for children to have a guardian who only acted on compulsion. At the same time, if the office is once accepted, it must be



faithfully and justly executed ; and, to the credit of human nature be it said, the trust is rarely refused.

I have already stated (p. 54) that a father has an absolute right to appoint a guardian for his children, to act after his death, and the mother has a modified right. Let me now advise *parents always to be sure to appoint a guardian by will*, and to be careful whom they appoint. A father and mother are best qualified to select the person or persons who shall look after the children ; and in my experience as a lawyer I can recall cases where the whole of a child's youth has been spoilt by the neglect to select a guardian, or by an injudicious selection.

I propose to show in this chapter : (1) How guardians are appointed ; (2) What their powers are ; and (3) What are their liabilities. And first let me deal with the question—**How guardians are appointed.**

#### IN ENGLAND

the father can, as I have said, always appoint a person, or more than one person, to be guardian of his infant children. There are *two ways* of doing this. The first and most usual is *by will*. I shall tell you in a later chapter how to make a valid will ; but it is sufficient for present purposes to say that the way to appoint a guardian by will is to put in the following clause :—"I appoint John Jones and Thomas Smith to be guardians of my infant children." Nothing could be very much simpler than that, and no amount of legal phraseology or long words will make it any more effective. The second way is *by deed*. A deed, as I shall explain elsewhere, is a document written on paper or parchment, signed and sealed by the man who makes it. By the Stamp Act, such a document must also have an Inland Revenue stamp upon it. I do not advise anyone who is not a lawyer to try to make a deed himself. He is just as likely to be wrong as right—rather more likely, in fact ; so he had better go to a solicitor and pay for having the thing done properly.

A deed to appoint a guardian is very rarely necessary, because the same object can be accomplished when you make your will ; but if you want to make assurance doubly sure, by all means make the deed. I only once advised a man to do it. He had made a will by which he appointed Brown and Jones the guardians of his infant children ; but he was a widower, in the prime of life, and he might at any time marry again. Now, when a man marries, any will previous to that date becomes invalid. Suppose, then, my client were to marry again, his will would be waste-paper, and the clause appointing the guardians would be worthless. Therefore, I said to him, "Make a deed and appoint Brown and Jones guardians of your children after your death." You see, although a second marriage would cancel the will, it would *not* cancel the deed.

The mother may also provide for the guardianship of her children after she is dead. This she does by a deed or by her will, exactly in the same way that the father does. But if the father of the children is living, the mother's guardian cannot act unless that father is unfit to have the entire care of the children. I have already explained this matter fully in the previous chapter. Suppose a father and mother both appoint guardians, these guardians will act together, and will have

equal powers. I have heard of a case in which the guardian appointed by the father claimed to have greater authority than the one appointed by the mother. He was wrong ; for although a father of children has greater authority than their mother, he does not transmit that preponderating authority to anybody else.

**Relations or even strangers** may appoint guardians sometimes. This looks rather curious, no doubt. It happens in this way : If anybody leaves money or other property to an infant, he is entitled to appoint a guardian for that infant, if the latter has no proper guardian already. Let us consider, then, who is a proper guardian. In the first place, the father, if alive, is the most proper of guardians, unless he is a man of such character and habits that it would be harmful for the child to live with him. The poet Shelley once had a dispute of this kind about his children. Like many another poet, Shelley was a man of decided views and strong passions, and after being married about three years, during which time two children were born, he quarrelled with his wife, left her, and cohabited with another woman. Mrs. Shelley at once went home to her father, taking the children with her ; but she did not live long. After her death Shelley went to the house of his father-in-law and demanded the children. But the father-in-law refused to hand them over ; whereupon Shelley avowed his intention of taking them away as soon as ever he could obtain possession of them.

Then the grandfather did **what anyone may do who wishes to protect a child from its father**—that is, he gave £2,000 to trustees in trust for the two children when they attained twenty-one. The trustees then applied to the Court of Chancery for an order to prevent Shelley from removing the infants out of their charge ; and the Court made the order, thus practically depriving the unfortunate poet of all control over his children, and putting that control in the hands of strangers. You will, no [doubt, want to know upon what ground the Lord Chancellor deprived a father of his children's society, and children of a father's care. The answer is : *For the benefit of the children themselves.* The truth is, as many of you have read, I daresay, the poet Shelley was an atheist, and he also had peculiar ideas of the conjugal relations. For instance, when he went to live with the other woman after deserting his wife, he did it openly, and boldly defended his action. He argued in favour of "free love" and against the tie of matrimony. Moreover, he expressed his intention of educating his children on his own lines.

The Lord Chancellor held that Shelley's views were irreligious and immoral ; and that, on the ground that he had expressed his intention of indoctrinating the children, he was not fit to control their education. The strong point against Shelley was not so much that he was immoral, or held immoral doctrines, but that he was openly immoral, and that his children could not help being contaminated had they been compelled to live with him.

I have said that the maternal grandfather of these children settled on them the sum of £2,000—a fairly large sum. Do not run away with the idea that it is necessary to settle a *large* sum on the infants in order to give you the right to appoint a guardian. You must settle something, otherwise you have no right to interfere ; but that something may be anything within your means. You must cut your coat according to your cloth ; and be just before you are generous. It is not everyone who could afford to make a gift of £2,000 for any object whatever. But



if you cannot afford £2,000, £200 will do just as well, or £100, or £50. I daresay a ten pound note would be sufficient, really ; but I never knew anyone to make the experiment.

About the same time that Shelley's case occurred, there was another child the question of whose guardianship aroused considerable interest. An Italian lady, by name Fagnani, was in England for a short time, and during that time was delivered of a girl. A few days after the confinement the mother left England and never came back. The child had been left in charge of an English nobleman. A Mr. Selwyn saw the little girl, took a great fancy to her, and finally adopted her as his daughter. But adoption has no binding legal force in England ; and Mr. Selwyn wanted to have his *protégée* in his legal care, so that even her parents could not take her away. He accordingly, being a very rich man, settled the sum of £10,000 on the fortunate young lady, when she should come of age, and applied to the Court of Chancery to be appointed her guardian. The request was granted, and so Miss Fagnani passed altogether out of the control of her parents into the custody of one whose only claim was his kindness.

But as a rule the wishes of a stranger will have no effect in the appointment of a guardian, especially in the lifetime of the father or mother.

**When the father and mother have both died without appointing a guardian,** the executors of the father ought to apply to the High Court of Justice and ask for someone to be appointed ; and if the executors do not apply, or if there are no executors, anybody can apply. Generally it is some relation ; but the merest stranger can do it if he is willing to take the trouble. As a rule, no guardian is applied for unless the infant has some property ; but whether there is property or not, the Court can appoint a guardian if asked to do so.

Sometimes, especially of recent years, people apply to be made the guardians of infants without property, and when they do there is very often a severe contest. You will understand the reason of this when I tell you how the disputes arise. A poor child, John O'Grady we will call him, is left a penniless orphan. A philanthropic institution takes him out of the streets and trains him to become a useful citizen. Now if the Home is a Protestant institution, all the children who go there are educated, probably, in the Protestant form of religion. Perhaps John O'Grady's father or mother may have been of the Roman Catholic faith, and some Roman Catholic, hearing that little John has been carried off to a heretical home, tells his priest, and the priest sets to work to rescue the poor boy from what he considers as contamination. And the way he does it is this : he goes to Mrs. Riche, a well-to-do supporter, who consents to be John's guardian. Mrs. Riche takes action in the Courts and asks to be appointed as such guardian. The Home folk do not like to part with their orphan, whom they are just beginning to civilise, and so they bring evidence to show that the boy is quite happy where he is, and that no good can be done by taking him away. In answer to this Mrs. Riche proves that John's father was a Roman Catholic, that she (Mrs. Riche) is a Roman Catholic, who will educate the lad in his father's religion, while the Home authorities are Protestants, who will cause the child to deviate from the faith of his progenitor. The arguments of the lady will generally be conclusive, unless her opponent can produce the boy, who, at an interview with the judge, may convince

his lordship that he (John) *is himself a Protestant by conviction*, and does not want to change guardians.

The same thing happens when a Roman Catholic institution takes in a boy whose father was a Protestant. In this case the Court will, if it is asked to do so, order the lad to be handed over to the care of a guardian of the same religion as his father. For it is a principle of English law, as I have elsewhere shown, that a child ought to be educated in the religion professed by its father ; and even if the latter is dead, his presumed wishes must be carried out.

Disputes of the kind I have just described are frequent, and occasionally rather amusing. It is touching to see the straits the litigants are put to sometimes to prove what the father's religion really was. Generally that worthy's faith is a matter of some speculation ; for such homes, as a rule, only take in the poorest and most destitute of the offspring of the "submerged tenth," as "General" Booth calls them.

I can remember a case where the child who formed the bone of contention was the son of a gentleman not unknown to the police, whose occupation, when he was not lodged in one of Her Majesty's institutions, consisted of "cracking cribs." Lawyers call it burglary. The religion of this amiable parent formed the subject of a long and painful inquiry. One side proved that during one temporary seclusion from the world—at Pentonville, I think—he had attended the Roman Catholic chapel. Then the other side were able to show that during another "stretch" he favoured the ministrations of the Church of England chaplain. In fact, he appeared to have undergone many conversions and reconversions, for he alternately attended the services of the one and the other religion. No one was able to prove that he went to any church at all when he was out of gaol. Finally the judge settled the matter by saying : "You, Mr. Blank, have got the child. You had better keep him." And so the ex-city Arab's religion was decided for him on the good old principle that possession is nine points of the law.

When a child under twenty-one is left with a fortune, but without father, mother, or guardian, it is imperative to appoint someone, and the only way of doing it is by applying to the High Court in London. Anyone who likes can apply and can ask either that he himself or somebody else shall be named as guardian of the infant. As a rule, the judge prefers to appoint a near relation to look after the welfare of the child, as, for instance, a grandfather, or an uncle, or an elder brother. It is of *very little use for a married woman to ask to be appointed* a guardian, and the reason is, that should she prove dishonest, and use some of her ward's money for her own purposes, it is more difficult to call her to account than it is to call a man to account. There is, however, no legal reason why a single woman should not be appointed, though a man is generally preferred, especially to be the guardian of a boy. There are obvious reasons for this preference. Boys, particularly when they are coming into their teens, often resent petticoat government. They will generally obey their mother for affection's sake, but an aunt might not be able to make herself obeyed.

*When there is no relation* both proper and willing to assume the office, the judge will be ready to appoint a stranger. His lordship will require to be satisfied that the proposed guardian is a person of respectability. Someone must swear an



affidavit after this manner : " I have known William Brown, the proposed guardian of the infant John Smith, for twenty-five years. The said William Brown is a grocer, and is, I believe, a respectable and upright man. He bears a good reputation in the locality where he lives and carries on business."

Last of all we come to the case *where no one can be found* who is willing to undertake the duties and responsibilities of a guardian. Then the Court itself will step in and take up the office, and the infant will have the honour of being the ward of no less a personage than the Lord High Chancellor. Not that his lordship will himself have very much to do with the matter. The real work will be in the hands of a solicitor and one of the judges of the Chancery Division of the High Court. This judge will decide with whom the child is to live from time to time ; how his property is to be managed, and his money invested ; to what school he is to be sent, and what business or profession he is to follow. The judge, in fact, has a great deal more power over his ward than a father has over a son.

#### WARDS OF COURT.

I suppose most people have heard of wards of Court. These interesting individuals, especially of the weaker sex, form a favourite subject for the novelist and the playwright. Who has not read a romance of the lives and woes of the gallant Edwin and the fair Angelina ; how passionately he adored her and how tenderly she worshipped him ; how they carried on a hazardous correspondence by means of notes secretly deposited in a hollow oak ('tis curious, by the way, to notice in what convenient places hollow oaks grow) ; how at last, she having evaded the vigilance of the duenna in green spectacles who mounted guard over her, they found an obliging cleric willing to tie the knot, who was just about to ask the crucial question, when a man with a forbidding cast of countenance rushed into the church and cried " Hold ! " and instead of being married, Edwin is haled off to prison, and the duenna once more takes possession of the weeping Angelina ? And all because the would-be bride was a ward of Court.

But few people know what a ward of Court really is. Let me enlighten. When a guardian is appointed by the Court, or when the judge himself acts as guardian, the ward is a ward of Court. To put it another way, all guardians except those appointed by the will or deed of a parent are under the control of the High Court of Justice, and their wards are wards of Court. Sometimes you hear them spoken of as " Wards of Chancery," or " Wards in Chancery," but the proper title for them is Wards of Court.

The position of a ward of Court may be briefly described. He or she is entirely under the control of a judge. If the judge has appointed a guardian, the latter may act in small matters upon his own discretion ; but in important things he must ask the judge. For instance, the guardian may decide how much pocket-money a ward is to have, and what clothes are to be purchased, provided that he does not spend more than the amount which is allowed for maintenance. But if he wants to send the youth to a University, or to put him into business, he must ask the judge first. Two things a guardian appointed by the Court must be very careful about. He must not take the ward abroad, or allow him to go abroad without the judge's permission. And in the second place, he must not allow the

ward to make love or be made love to with a view to marriage, still less to be engaged to be married, and even less than that, to marry without leave from his lordship.

**Marrying a Ward of Court.**—The holy bonds of matrimony are often assumed with a light heart, but the terrors of espousing a ward of Court are enough to blanch the cheek and seriously interfere with the pulse of the bravest man who ever stormed a battery. In the first place, I am supposing that you want to marry the young lady (or the young gentleman) openly and honourably. To do this you must get the consent of the judge, and his lordship, having been toughened by years of practice as a lawyer, and completely hardened by a period of sitting on the Bench, is by no means a sentimental person. He does not ask you how much you are in love, nor will it move him to hear that your life will be a blank without her. He will want to know whether you are a steady young man; what is your balance at your banker's; how much a year you earn, and your prospects of earning more; and what is your social position. The shrewd old gentleman will have to be satisfied that your means are fairly equal to those of his ward. He will have to be satisfied that you are her equal in social *status*. He will have to be satisfied also that you are neither a drunkard nor a gambler, nor a keeper of loose company.

If you ever have to interview a judge of the Chancery Division to ask him for the hand of one of those whose welfare he watches over, you will find him of an inquiring turn of mind. Men who have come through the ordeal can tell you how painful it was to "ask papa," as the formula goes. But a Chancery judge is worse than the sternest parent. He turns you inside out in a quarter of an hour, and is so thoroughly unsentimental and businesslike, not to say mercenary, that you will probably wish you had never seen him. Of course, there are cases in which the match is obviously to the advantage of the ward of Court, and then the judge will not be so minute in his inquiries. For instance, if the hand of a ward whose fortune is a modest thousand pounds is sought by a suitor who offers to settle on the marriage ten thousand, his lordship will not ask many questions, but will give a speedy and hearty assent.

But suppose the judge shall not think well of the match and should refuse his consent, there is only one thing for it, and that is to practise the virtue of patience. Wait until your inamorata is twenty-one, and then she can change her name and station without asking leave of anyone; nor may any judge say her nay. Cases have occurred, however, in which the lovers had not been patient, but instead thereof have taken the first opportunity of marrying in a quiet way, and without telling anybody of their intentions. These cases used to occur far more frequently fifty or a hundred years ago than they do now. I do not know why there has been such a falling-off in the romantic spirit, but a falling-off there certainly has been. Our grandfathers would boldly disobey the orders of a Lord Chancellor, and carry off his wards from under the very eyes of their guardian. But we, their unworthy descendants, sit down quietly and wait for the twenty-first anniversary of her birthday.

It is a serious thing to marry a ward of Court without the permission of a judge. The kind of cases that happen are three—namely: (1) When A B marries C D, a ward of Court, in pure ignorance, not knowing that C D is a



ward of Court; (2) When A B, knowing that C D is a ward of Court, marries her, but in ignorance of the fact that he is committing an offence by so doing; (3) When A B, having asked for leave to marry C D and having been refused, nevertheless persuades C D to run away with him and be married.

Case I. is not generally very serious. The Court will graciously accept the apologies of the husband, and will not, as a rule, punish him. But inquiries will be made into his means, and if it be found that he is worth money, it will be gently intimated to him that his apologies are much more likely to be accepted if accompanied by an offer to settle something on the wife and children of the marriage.

Case II. is rather more serious. By the law, everybody is supposed to know the law, and it is not a legal excuse for the person who marries a ward of Court to say that he did not know he ought to have asked the judge's leave first. The answer will be that he ought to have known. So he is liable to be sent to prison for *Contempt of Court*, and kept there until such time as the judge likes to let him out. And before he is released he will have to apologise, and pay all the costs incurred in sending him there, and also consent to all his wife's property being settled on her so that he cannot touch it. The period of the imprisonment varies. Sometimes it is only nominal—for a day or two; sometimes it will last for weeks or months. Especially is the Court severe upon those fortune-hunting adventurers of the "foreign Count" type, who come from nobody knows where and live nobody knows how; but who have the knack of acquiring absolute dominion over the minds of some young women. A man of this character may feel pretty sure that his expressions of regret will not go for much, and he will not be let out of prison until his wife's money has been, as far as possible, tied up so that he cannot touch it.

Case III. is the most serious of all. It is one of the very grossest contempts of which a man can be guilty—to marry a ward of Court after he has been positively ordered not to do so. A story comes to my mind of a man who swore at the judge in an American court of law. The judge at once fined him ten dollars. "What is that for?" inquired the delinquent. "It is for contempt of court," the judge replied. "Well," rejoined the man, "I have the very greatest contempt for this court."<sup>2</sup> Whereupon he paid twenty dollars more to the clerk, swore twice, both loud and deep, and departed well pleased. The offence is cheap in America, it seems, but it is anything but cheap in England. There is no definite punishment, no maximum sentence, as there is in the case of an ordinary crime. The punishment for contempt of Court is left to the judge whose authority has been set at naught. He may impose a fine, or he may send to prison until the defendant has purged his contempt. The phrase "purged his contempt" means that the prisoner must apologise, and do all he can to mend his error and repair the consequences of his disobedience. In the peculiar case we are now considering, the mischief cannot be undone, for the disobedient couple cannot be unmarried. At the same time, the husband can be compelled to make provision for his wife and future family out of any fortune he may have, and to agree to the wife's money being settled on her, just as he would have had to do if he had married with the Court's consent. And then, to teach him not to do it again, he will be made to

cool his heels in gaol for a while, and to add to the pleasure of it, he will never know how long he is going to be kept there.

In what I have hitherto said about the marriage of wards of Court, I have assumed that the ward is of the gentler sex. But the same rules apply to the male ward. He must apply for leave to marry, and satisfy the judge that there is a fair measure of equality between the rank and fortune of the lady and his own pecuniary and social position. If any woman marries a ward of Court without permission she is liable to be punished. If the judge is satisfied that she is a designing woman who has inveigled the unsuspecting youth into a clandestine marriage and an untimely fate, he will generally meet the situation by imprisoning not the wife but the husband until he makes a settlement of his property in such a way that his wife cannot get any of it.

There is one case on record where very extreme measures were resorted to. A woman of ill fame had persuaded a ward of Court of the age of nineteen or so to make her his wife. The matter was brought to the knowledge of the Court of Chancery, with the result that the Chancellor actually forbade the couple to live together, or to see each other, or hold any communication. As might have been expected in the circumstances, the woman went with some other man; and the husband, who by this time was anxious to get rid of his wife, procured a divorce on the ground of her adultery. My own opinion is that the Lord Chancellor ought never to have made an order to compel a husband and wife to live apart when they wanted to live together; and, perhaps, if such a case occurred to-day, the judge would not take such a decided step. But the case is useful as showing how enormous is the power of control that the Court may exercise over its wards.

Let us now discuss (1) **the rights** and (2) **the duties and liabilities of guardians.**

#### THE RIGHTS OF A GUARDIAN

are somewhat similar to those of parents, but with this difference, that whereas a parent cannot easily obtain the aid of a Court to compel his child to obey him, the guardian can. So that really a guardian has more power over a ward than a parent has over his child. The first right possessed by a guardian is to exact *obedience to every reasonable command*. He may, for instance, order the ward not to stay out after ten o'clock at night; or not to go to a theatre or music-hall; or to go to a particular school; and the ward is bound to obey. In fact, the guardian is entitled to exercise a control over all the actions of his ward. There is only one qualification, which is, that the guardian must act reasonably and not behave like a tyrant. Let us see more in detail the kind of control exercisable over a ward.

**Custody.**—The guardian has an absolute legal right to the custody of his ward, and can compel the ward to live with him, if he likes. It sometimes happens that *the ward objects* to live with the guardian, or with the person whom the guardian chooses, and may wish to reside elsewhere. So long as the infant does not actually disobey the guardian's orders in this respect, no harm is done; but if he or she actually goes elsewhere, the guardian may take action to enforce his wishes. And here **a great difference is made between male and female wards.** A male ward will not receive much consideration; and unless he can show very good reasons indeed for his disobedience, he will be ordered to obey.



But a young lady will be allowed more latitude, as the following instance will show. Miss Nicoll, aged sixteen, was left by her father to the care of an aunt, a Mrs. Oakover. Now Mrs. Oakover was strict—a great deal too strict for her niece, who had been indulgently brought up by her late father. After living with her guardian for a few months, Miss Nicoll ran away, and persuaded a Mr. Hexeter, an old friend of her father's, to take her into his house. The aunt applied to the Court, on behalf of herself and all the other relations of the ward, that the latter should be placed in the custody of an uncle or some other relation. But the lady in question, who though young, had a will of her own, and had quarrelled, even at the early age of sixteen, with all her kith and kin, stoutly objected. She told the Lord Chancellor who tried the case that she disliked the society of her various uncles and aunts. They were kin but not kind to her, and for her part she much preferred her father's ancient neighbour and crony, good Mr. Hexeter.

You know the old saw about a wilful man, and you either have found out or some day will find out that it applies with tenfold force to a wilful woman. And eventually Miss Nicoll had her way. The Lord Chancellor refused to force the inclinations of a young woman of sixteen—an age at which she might, by the law of the land, be married if she only found a partner to whom the guardian could not object; and he laid down the law that in the case of a female the inclinations of the ward ought to have some weight in choosing a place of residence. At the same time his lordship was careful to remark that he would not have been so tender if it had been a youth instead of a maiden with whom he had been dealing.

**Education.**—The guardian has the right to choose *how and where* the ward shall be educated. Lord Hardwicke, the same Chancellor who decided the case of Miss Nicoll, once had an application made to him by a guardian to compel a lad to go to school. The boy was sixteen years old, and had been to Eton for a year or two, but after the summer holiday he refused to return there. Lord Hardwicke asked the youth whether he had any reasonable cause of complaint against the head master; but the boy had not, except that he did not like him, and asked that he might be allowed to have a private tutor. Then the judge delivered a little lecture to the lad. He told him that he must obey his guardian, who was the proper judge at what school to place him; that Eton was a place of great reputation; and that if there was any more refusal to go, he (the Chancellor) would take measures to compel obedience. In this particular case, no doubt, the great Chancellor spoke feelingly, for his own early circumstances had been such as to prevent him from receiving a public school or university education. He had risen from the position of an attorney's clerk to be the first commoner in the realm, and though by diligent consumption of the midnight oil he had acquired much learning, he always felt the lack of that training which only a public school can bestow.

It is recorded that the rebellious youth betook himself to Eton without more ado, thus avoiding the fate of a young man who, a few years before, had refused to go to Cambridge University when ordered by his guardian. The latter presented a petition to the Chancellor, asking for assistance, and the Chancellor responded by giving the youth into the custody of a tipstaff (a sort of policeman), and telling the



*Photo: Cassell & Co. Ltd.*

THE ROYAL COURTS OF JUSTICE, LONDON.





tipstaff to carry his charge to Cambridge and deposit him at his college there, which the tipstaff faithfully did. One does not like to contemplate the frame of mind of the unfortunate undergraduate, nor to speculate on the kind of life he would lead until the memory of his adventure had faded out of the minds of his fellow students. These two cases, culled from the romantic pages of the Law Reports, will show how absolute is the power of the guardian, and in what way the Courts will assist him in carrying out the duties of his thankless office.

**Punishment and Personal Chastisement.**—A guardian has a right to inflict punishment on his ward, but only to a reasonable extent. What is reasonable depends on what the ward's offence was, and also on the manner and extent of the correction. To strike a boy or girl with a thick stick, for instance, can never be reasonable; nor will it be justifiable to hit a child in a part of the body that may be seriously or permanently injured. It is difficult precisely to define "reasonable correction," because every case must be considered on its merits. A safe working rule to follow is, not to resort to the argument of force until all milder measures have failed to secure obedience; and if the birch or the cane should become necessary, only to use it very little at a time. Besides personal chastisement, there are other means of punishment open to guardians. The familiar bread-and-water diet, confinement to a room, and so on, are quite legal, so long as they are not inflicted to an extent that may injure the health of the ward.

**Obedience Generally.**—Obedience is the right of the guardian. He is legally responsible for the welfare of his charge, and it is, therefore, only fair that he should be allowed to exact a prompt obedience to his reasonable commands. Illustrations of how the law will assist the guardian in this respect have been given under the heading of "Education." Another case, which occurred some years ago, may not be out of place here. A wealthy gentleman named Simonds, of Yarmouth, died leaving all his property to his daughter, but if she died before attaining twenty-one, it was all to go to her mother's family. Mr. Simonds had relations of his own, but he regarded them with anything but kindly feelings, and had taken care to provide that none of his money should go to them. The daughter was left to the guardianship of two friends, who studiously kept her out of the way of her father's relations. One Christmas time, when the girl was about eighteen years old, one of these relations, hearing that she was at school in the neighbourhood, invited her to a party at his house. The house was a tavern, not bearing the best of reputations. The schoolmistress wrote to the guardians on the matter, and they promptly replied, forbidding their ward to accept the invitation. But she did accept it; and, what is more, waiting until the schoolmistress's back was turned, went to her cousin's party. This put the schoolmistress in a terrible plight, and she posted off to the guardians with the news. These gentlemen did not care to go to the tavern to rescue their unruly pupil, so they engaged two policemen to do it. The officers duly went, took the young lady back to school, and an action was brought against the guardians. The Court held them justified in the line they had adopted, and said they had a perfect right to forbid the girl to go in the first place, and in the second place to send for her when they knew she had gone. We see from this that the guardian has a right to choose what company the ward shall keep.



**Religion.**—In one matter *a guardian has no choice and no discretion*, and that is in the matter of the ward's religion. As I have said before, the choice of a child's religion is a matter for his father, and for no other person, until the child is old enough to decide. It is the guardian's absolute duty to cause his ward to be educated in its father's religion. Suppose, for instance, the father was a member of the Church of England, and the guardian is a Roman Catholic, the guardian must see to it that he does not attempt to convert the child to his own form of faith. And he must not allow anyone else to do so either. If the guardian should so far forget his duty as to induce, still more to compel the ward to attend the services of the Roman Church, or to receive instruction in its doctrines, he will render himself liable to dismissal from his office. Any friend of the child who takes any interest in him may make an application to the High Court by a summons to have the guardian removed and another one appointed. If the judge finds the guardian guilty of the charge laid to his door, he will dismiss him and appoint another guardian, and will make the dismissed one pay all the costs of the application. Hence it is risky, and may be expensive, to attempt the conversion of one's ward to one's own religion.

**Courtship and Marriage** are other matters in which the guardian has very great authority. He has **the right to forbid his ward to make an unsuitable matrimonial alliance**. Suitability, as I have explained in the pages relating to Wards of Court, has reference to rank, social position, and fortune, as well as to age and character. The position of a guardian in this respect is not so strong as that of a father. A father can absolutely forbid a son or daughter under twenty-one to marry, for any reason or no reason. A guardian, on the other hand, must have a reason. He can, as I said, forbid an unsuitable match, but no other. Therefore, if he forbids his ward to marry a particular person, the ward can bring an action to compel him to state his reasons; and if, in the opinion of the judge, those reasons are absurd, the judge may grant permission for the marriage to take place.

What is the position, then? It amounts to this:—If the ward wants to marry, he (or she) must ask leave of the guardian. If consent is given, the wedding-ring may be ordered at once, and the marriage may take place. But suppose consent is refused, then one of three things happens. Either the ward declares his (or her) intention of waiting until majority, in which case there is no more to be said. Or the lovers may avow their intention to marry, permission or no permission. In that case the guardian must bring an action against them for an injunction to prevent them from marrying. He will get his injunction almost as a matter of course, for a judge will rarely listen to young people who talk about marrying in the face of opposition from a responsible guardian. If the marriage takes place in defiance of the injunction, it is contempt of Court, and I have said enough about that subject to show how unpleasant are its consequences.

Or again, and this is the most business-like way (but when are lovers business-like?), the ward applies to a judge to overrule the guardian. He is not very likely to do it, but the mere fact of an application being made will make him a little more lenient. The judge's permission being granted, the guardian has no more to say; but if the permission is refused, the ward had better not marry,

and the other party had better not marry the ward, for to do so is a contempt of Court, entailing the usual consequences of imprisonment until further orders.

Let me suppose that you are the guardian of a girl who, unknown to you, has been carrying on a correspondence with some man of whom either you know nothing, or you know nothing very creditable. One fine morning you are told that your ward's banns have been put up at church, or that a notice with her name on it has been seen in the registrar's office. What are you to do? Before you can get to a judge of the High Court the mischief may be done, and it is your duty to stop it if possible. You ought to go at once to the church where the banns were published, or to the registry of marriages where the notice is exhibited, and give notice of objection. Neither clergyman nor registrar dare perform the ceremony after that. Then, having averted the most pressing danger, you should go to the High Court and ask for an injunction against your ward's *fiancé* and your ward, to prohibit them holding any correspondence whatever. And such an injunction will be readily granted.

But you may be too late. The marriage may have taken place that very morning. Of course, you cannot untie the knot matrimonial, but you can and ought to do what is possible to *protect your ward's property* from her husband; and here again you will have to ask the assistance of a judge. On satisfying his lordship that your ward has married without your consent, the Court will make an order for her property to be settled on her and her children (if any), and if she has no children, then after her death it will go to her relatives. The judge will take exceeding care to devise a means whereby the husband shall lose every ghost of a chance of succeeding to his wife's money. Or, if the ward was a man, his lordship will make an order for a deed to be drawn up whereby the wife shall take none of her husband's property. This is the same as in the case of a child marrying without his parents' permission (p. 53), and the object is to punish fortune-hunters of both sexes who prey upon young heirs and heiresses. Experience has shown that to deprive such people of the result of their industry is about the most effective punishment that could be devised.

I have now shown you the rights of a guardian; how he is entitled to the custody of his ward, and to choose what company the ward shall keep; how he may compel obedience to reasonable commands by corporal punishment if necessary; how he may, on any reasonable ground, forbid the ward to marry a particular person; and how he can control the ward's education. We have seen, also, that however wide the discretion of a guardian may be in other matters, he has no right to control the religious education of his ward. From a consideration of the rights, I pass to

#### THE DUTIES OF A GUARDIAN.

The first duty of a guardian is to see that his ward is properly fed and clothed. Mark! I do not say to feed and clothe him; because no guardian is ever bound to put his hand in his pocket and spend his own money on his charge. That would be a trifle too much to expect. But what he is bound to do is to see that an allowance for maintenance is secured out of the ward's property.

Guardians are of two kinds, namely, guardians of the person and guardians of the estate. Sometimes the same person combines both offices and it is



generally more convenient that it should be so. Not always, however, for a guardian of the estate, who is merely a trustee, should be selected for his business capacity, while a guardian of the person may be and ought to be chosen because he is likely to take an interest in and do his best to advance the child. When one person is guardian of the person and another guardian or trustee of the estate, the former ought to apply to the latter for an allowance wherewith to support the ward, unless he means to bear the expense himself.

Now, here the two guardians often come in conflict. They are like the Chancellor of the Exchequer and the First Lord of the Admiralty. "Give me more money for ships and men," demands the First Lord. "I cannot, without turning my surplus into a deficit, and being obliged to increase the taxation," answers the other. "Then put a penny on the income tax." "What! and be howled at from one end of the country to the other! Pray, leave me my beautiful little surplus." So the guardian of the person wants to maintain his ward with every comfort, and the other, if he be a conscientious trustee, wants to save as much as he can, so as to have a big balance when the infant comes of age.

How is the dispute to be decided? What are the rules of law? They are few and simple. In the first place, an allowance for maintenance should never be made out of capital, if it can be avoided. It should be made out of interest only. In the next place, if there is a large income, a liberal allowance should be made, enough to cover the expense of keeping the ward in such comfort as young men of his class are usually maintained in. But an allowance should never be extravagantly liberal.

I said that maintenance should not be allowed out of capital if it could be avoided. Sometimes it cannot be helped. For instance, when a father appointed A B guardian of his daughter, aged six, and left a modest sum of £200 in Consols to trustees in trust for that daughter, the trustees were ordered to pay the sum of £20 a year to A B for the maintenance of the child. The £200 would only produce £5 10s. interest, so that in the first year £14 10s. would come out of capital. The next year rather more of the £20 would be capital, and by the time the girl was fifteen her modest fortune would have shrunk to still more modest proportions—say about £60. But at that age she would be able to work, and probably keep herself. From the day she was able to do this, the allowance to the guardian would be stopped, and the remnant of the £200 would go on accumulating until its owner is twenty-one. So much for maintenance. Now let us consider the guardian's duty in respect of

**Education.**—That duty is to see that the ward receives such an educational training as will fit him for the station in life he may fairly expect to occupy. A lad of considerable fortune should be sent to a good public school, such as Eton or Harrow, Winchester or Charterhouse. Then he ought to be entered at one of the Universities, and kept there until his education is completed. A boy of more moderate means should be placed at a less expensive school—with this proviso, that a guardian will be justified in spending almost anything to procure a first-class education for his ward, so long as he does not encroach upon capital. There are now good schools in all parts of the country, suited to all pockets; and a boy is entitled to the best education his means will allow.

I do not lay down any hard and fast rule. For instance, in the case of a youth who is intended for the army, he will not be placed at Oxford or Cambridge, but at Sandhurst or Woolwich, it being the usual thing not to send candidates for the Queen's commission to a University. The funds for education must be paid by the guardian or trustee of the infant's estate, and if he has any doubt about the amount he ought to pay, or if he thinks the education proposed is too expensive, he will be wise to go to his solicitor and ask that gentleman to obtain the opinion of a judge.

**The Business of Life.**—Having provided for his ward's education, it is the duty of the guardian of the person to provide for his start in life. In this respect the guardian is bound to do what the law supposes a wise and affectionate father would do. What would such a father do? Well, he would consult the child, and find out whether there was any business or profession for which he had a liking and an aptitude. If there was, he would consider whether that business or profession was within the range of achievement. For instance, it would be of no use to apprentice a lad to an engineer, if, after paying the premium, there would not be enough left to support the apprentice during his apprenticeship. Nor ought a guardian to place a boy without much capital in a business which will require a lot of money to start properly. These are rules of common-sense as well as rules of law.

At the same time, a great deal of regard ought to be paid to the wishes of the ward in this respect. It is not like education. Of that the guardian is the best judge. But the chances of success in any particular avocation depend so much on the liking of the worker for his work, that it is important never to try to make a young man work at something which is repulsive to him. Try even to place him at something which he positively likes. As I have shown, the father has no right to compel his son to be this or that. A guardian has. But this power is subject to the controlling power of a judge, to whom the ward, or any friend of the ward, may appeal against a harsh and unreasonable demand. To sum up, it is a duty of the guardians to put the ward in the way of making the most of his peculiar talents, and to prevent him from embarking on a speculative or risky calling without the necessary funds at his back.

**Marriage.**—I have shown that a guardian has a right to prevent his ward from marrying unsuitably. I now have to state that the guardian has a duty to prevent the ward from so marrying. You will see under the head of "Courtship and Marriage" (p. 82) how this can be accomplished.

**When Guardianship Ends.**—The rights and duties of a guardian cease when the ward attains twenty-one. It is impossible to put a person under guardianship for longer than that. I have known cases where fathers, whose sons were rather wild and extravagant, have tried to place them in guardianship until they were thirty years old instead of twenty-one. A friend of mine was once instructed to draw a will, and by this will the testator wanted, as he expressed it, "to put his son in Chancery until the young rascal is thirty." But he had to be told that it could not be done. The Chancery Division absolutely will *not* take care of a person who is over twenty-one, and a very good thing too. We know what extraordinary wills some people make; and I have no doubt that if the law allowed parents to



put off the "coming of age" of their children, some eccentric father would want to keep his son an infant until he was sixty.

But although you cannot place the person of your child under a guardian's control after he is twenty-one, **you can place his fortune out of his reach** for longer than that. I advise anyone who has an extravagant son, and who wants that son to have an income, but to be unable to touch the capital, and to be unable to spend the income before he gets it, to make his will in this way:—"I give £—— to A and B to hold on trust to pay my son Tom the income for life, or until he shall charge or mortgage the same, or do or suffer anything whereby the income be payable to any person other than my said son Tom."

Let me explain this: you cannot give Tom the money to be his absolutely, with a proviso that if he mortgages the capital he shall cease to be the owner. You can only do it by giving him the income of the fund for life. The reason is this: If you give anybody the absolute ownership of property, you cannot impose conditions restricting his enjoyment of that property. But if you do not give him the ownership, but only a limited or qualified right in it, you can qualify or limit that right still further. For example, if I say, "I give £1,000 to Tom, but if he spends any of it, the money shall cease to be his and shall go to his brother John"—that is a contradiction in terms. It is like saying, "Here is a sheep for your own, but if you kill it I shall take away the carcass." How can the sheep be a man's own if he cannot do what he likes with it?

On the other hand, if I say, "Here is a sheep; you may have the use of it for so long, and cut off the wool every year at shearing-time; but if I catch you shearing the sheep before the proper season, I will take the animal away." Here you have not a gift of the sheep, but a gift of the use of the sheep for a certain time and under certain conditions, and there is nothing unreasonable about imposing such conditions. If, on the other hand, you allowed conditions to be imposed on ownership, there would be no finality anywhere, and the inconvenience would undoubtedly be very great. One faddist would impose one restriction, and another another, until at last you would have half the property in the kingdom so fettered that it would be almost useless to the owners.

**No Profit Allowed.**—A guardian's office, as it is voluntary, is also gratuitous, and he is not allowed to charge anything except for out-of-pocket expenses. Thus, if he spends a whole day about the ward's business, he may charge cab fares, railway fares, and so on, but *not one penny for lost time*.

### IN SCOTLAND

we have to consider a very different state of things. In Scotland there are two distinct ages of the child to be considered: (1) When he is *under fourteen*, and (2) when he is *between fourteen and twenty-one*. In English law everybody under twenty-one is called an infant, and the guardian of a child of ten has as much authority over him as the guardian of a young man of twenty. In considering the Scots law we must divide our subject into two parts, the first relating to **tutor and pupil**, and the second to **curator and minor**.

**Definitions.**—A tutor is a person appointed to take care of the person and

property of a male child under fourteen or a female under twelve, which child is called a pupil.

**When and How are Tutors Appointed?**—They are appointed whenever the father or mother dies leaving a child under the age of fourteen (male) or twelve (female). On the death of the father, the mother, if she survives, becomes tutor and acts along with any tutor appointed by the father's will. Let me make this clear. (a) The father dies without appointing a tutor. The mother becomes sole tutor. (b) The father appoints a tutor by his will. The mother and the tutor appointed act as joint tutors. This depends on the Guardianship of Infants Act, 1886, which applies both to Scotland and England.

When can the mother appoint a tutor? And the answer is, she can always appoint one to act when the father is dead; but when the father is living she can only do so if the father is a person of such a character as to make him unfit to have the sole care of the child. Let me make this clear also. Mrs. X by her will appoints A to be the tutor of her children. (a) If Mr. X is living, A has no power to act unless he can prove that Mr. X is a man of bad character, or has been guilty of cruelty to his children. (b) If Mr. X is dead, and has not appointed a tutor by his will, A is the sole tutor. (c) If Mr. X is dead, and has by his will also appointed B as tutor of the children, A and B are joint tutors.

It may happen, however, that both parents have died without naming anyone for the office. Then we have a state of the law which is similar to that which at one time prevailed in England—namely, the nearest male relation on the father's side has the right to be appointed tutor of the child. Perhaps I should say that he has the right to *ask* to be appointed tutor, for he must be confirmed by a judge, and he will not be confirmed unless the judge is satisfied that he is a person of probity and businesslike habits, likely to take good care of the pupil's property, and to manage it to the best advantage. Such a tutor is called a tutor-at-law, and he is always the person who is next heir to the pupil's property. The reason for giving him the first right to the tutorship is, that as he is the next heir to the property, he is the most likely of all persons to take good care of it.

But a tutor-at-law has no right to the custody of the pupil himself. I will tell you why. The old Scots law reasoned thus: "Let us give the care of the property to the next heir, because he has an interest in taking care of it, for if the pupil should die before reaching fourteen, the tutor-at-law will get the property. On the other hand, *it is not to his interest that the pupil should live*, for the same reason. Therefore, we will not place the pupil to live with him. If we did, he might be tempted to adopt nefarious means of putting an end to the life which stands between him and the property." And so the pupil is put to live with the nearest relation on the mother's side, provided that such relation is not a married woman. A tutor-at-law is not often appointed now, but the person who has the right to be tutor-at-law asks instead to be appointed factor, or manager of the property only.

When there is no male relation on the father's side who is both willing and proper to act, some *kinsman* ought to apply to the Court of Session for a



tutor to be appointed by that Court ; or he can apply, if he likes, for someone to be made factor of the child's property.

We see, then, that tutors are appointed either by the father, the mother, or the Court. Now let us consider the rights, duties, and liabilities of a tutor.

**A decent aliment** or means of support is what the tutor should always allow his pupil. What a decent aliment is depends on the circumstances of the boy or girl. A child with a small fortune must be supported on less than one of ample means, and in no case is the tutor justified in paying aliment out of capital. It is easy enough in these days to find a home for a child in return for a very modest payment, and there are scores of honest decent folk willing enough to take in little Jeanie or Sandy for a very few shillings weekly. On the other hand, if money is plentiful, young Miss Jean or Master Alexander are sure to find hundreds of people willing to provide all the comforts of a home in return for a liberal quarterly allowance.

**Education.**—A tutor is also bound to see that the pupil receives the best education to which his purse will stretch, and the remarks on pages 80 and 84 in respect of the same subject in connection with Guardianship in England apply here. But where the tutor has not the actual custody of the child—as, for instance, where he is tutor-at-law—he cannot control the education. That duty is left to the person who has the custody.

As to **marriage**, we have to make the same observation with which Artemus Ward concluded a lecture on “Snakes in Ireland.” The genial humorist had a large audience—for when will Irishmen not attend in their thousands to hear of the old country?—to whom he expatiated for about an hour on men and matters in general. When the hands pointed to the time for going home, Ward said, “I am announced to lecture to-night on ‘Snakes in Ireland.’ There are no snakes in Ireland.” Whereupon he sat down. So with the marriage and tutorship. There is no law on the subject, because no male under fourteen or female under twelve can marry, whether with consent or without it.

**The property of the pupil** is the chief concern of the tutor, and as his duties in this respect are somewhat heavy, let us carefully define them.

The first thing a tutor must do is to **make an inventory** or list of the property belonging to the pupil. If not, he will not be entitled to be repaid any money he may spend in lawsuits brought for the pupil's benefit, or actions defended by him for the pupil's benefit.

The second duty is to **take care of the property**, and he will accomplish this object by investing such part of it as consists of money in safe securities. That is, if he finds any money in the bank, or just lent out without proper heritable security, he must get in that money and at once invest it. He has a pretty wide range of investment nowadays, but he must keep within that range, or else if the money is lost he will have to make it good. When I am dealing with trustees I will state in full what the securities are upon which tutors may invest.

The third duty is to **manage** the property. In the case of such things as stocks and shares very little management is requisite. All the tutor has to do is to receive the interest of the investments, pay the pupil's aliment and expenses

of schooling, and if there is anything over, invest it so as to increase the capital fund. But in the case of landed property it is different. There are, in the ordinary management of landed property, houses or farms to be let, rents to collect, repairs to be undertaken, and so on.

*The tutor has the power to do all these things—but with some little reserve.* He may not, for instance, make a lease of a tenement or of land in the same way as an owner might. He may lease it during the period of the tutelage only, unless he cares to apply to the Court of Session for leave, as I shall explain hereafter.

Take an instance :—You are tutor to a boy of six years of age. That boy's property consists of two self-contained houses. One of these is vacant, and somebody wants to become tenant of it, and to take it on a lease for, say, twenty years. Well, you cannot, on your own responsibility, let it for that period, however eligible the tenant may be, and whatever the terms he may offer. "Why not?" you ask. "Why, if a good bargain presents itself, may I not seize upon it for my pupil's benefit?" And the answer is, that your office only lasts until the lad is fourteen, therefore you can only make a lease for eight years. But, if the bargain offered is good enough to make it worth the small expense, you may present a petition to the Court of Session asking leave to make this lease for twenty years, and the Court may allow you to do it.

In managing your pupil's property it is your duty to sue for debts, give receipts for money, collect rents and interest, and to do this promptly and diligently. You must also, on the other hand, pay debts and liabilities, and you ought always to try to reduce the debts on the estate to the lowest possible point. Thus, if you have a sum of money in hand, arising from rents or interest on investments, and there is a bond over part of the pupil's property, you ought to pay off the whole or part of the bond with that surplus. In fact, you must manage your pupil's affairs with the same carefulness and circumspection that you would display in your own. Take no risks that can possibly be avoided, for a prudent man avoids risk in his own business, and you are expected to behave as a prudent man.

The last important duty of a tutor is **to account to the pupil** when he attains the age of fourteen (or twelve if a female). This, of course, involves the necessity of keeping an exact account of receipts and expenditure, so that when the pupil is free of your care you can show him all the ins and outs of the management of his property. It will not be enough for you to produce a balance-sheet containing a mere general statement of account. You must be ready with every detail, and able to produce the receipts of those to whom you have paid money. Even then it is not enough to put a bundle of papers before the boy, and say, "Here are all the accounts." You must explain them to him, and give him every explanation. And even if he says he is satisfied that you are honest, and does not require any explanation, you must insist on explaining all the same.

When you have rendered your accounts, you must pay over the balance to the curator of the minor, who now relieves you of your charge.

**The liabilities of a tutor** may be summoned up in very short compass. He is liable to make good any loss incurred by the pupil through his fraud, neglect, or carelessness. Suppose, for instance, Jones owes money to the pupil's estate, and you (the tutor) do not look sharply after Jones, and let the debt run on, and do



not sue him for it, but allow yourself to be put off by excuses time after time. In the end, Jones stops payment, and the debt is lost. You may find yourself liable to make it good, because if you had not shilly-shallied you would have had Mr. Jones in the Sheriff's Court long ago. I do not wish to touch on Fraud in the ordinary sense of the word, but merely on something which is **a kind of fraud particularly applicable to tutors and trustees.** A pupil has some property for sale. The tutor, in perfect good faith, buys it for himself, paying a good price for it. Some time, it may be years afterwards, the property goes up in value, and the tutor re-sells and makes a profit. He will have to give that profit to the pupil. I will tell you why. The tutor is appointed to protect the pupil, whose tender years and want of discretion preclude him from doing business on his own account. From that point of view it is his *duty* to get the highest possible price for the pupil's property. But if he buys himself, his *interest* conflicts with his duty, for the interest of a buyer is to buy in the cheapest market—in other words, to pay as little as he can. You see, therefore, how important it is for the sake of the pupil that his tutor should not be the buyer of his property. It is just the same if the pupil has surplus money and wants to buy. The tutor must not sell his own property, because, while it is his duty to buy for the pupil in the cheapest market, it is his interest as seller to get the highest price he can.

For this reason, in order that a tutor may not find his duty and his interest in conflict, the judges have laid down the law that a tutor must have no dealings with his pupil—no buying or selling, or anything of that kind. And any such dealings are treated as fraudulent on the tutor's part. The result is, that any profit he has made, directly or indirectly, from any dealings with the pupil's property, will be taken from him and given to the pupil. It does not matter in the least whether the tutor acted *bonâ fide* or not. The rule is a strict one, to which there are no exceptions. If you have sold anything to your pupil, he can come to you years afterwards and say, "Take back your thing and give me back my money." And you cannot get out of it. In vain you plead that you let him have it for less than he could have got it elsewhere. He can reply that he does not want it now, he wants his money back. And he will be entitled to have it.

Remuneration is also denied to a tutor. He must take all the trouble to which I have alluded, but **he must not charge a penny** for it. It is possible, and it frequently happens, that when a father or mother names a friend to act as tutor to the children, there is attached to the appointment a small legacy, and this the tutor may keep. But that is the only way in which he can be paid. So it comes to this, that tutors appointed by the Court of Session are never paid at all, neither are tutors-at-law, while tutors appointed by the will of father or mother are not entitled to anything; but the testator may leave them a legacy if he pleases.

**Assistance in management** is allowed to a tutor, and he is also entitled to deduct from the pupil's funds anything that he is **out of pocket.** Tutors generally, for instance, put the collection of rents into the hands of a factor, to whom they pay a commission on the amount collected. If anybody will not pay a debt, a lawyer has to be employed to set the law in motion against him, and, as all the world knows, a lawyer does not work, as Sam Weller says, "Free, gracious,

and for nothing." The expense of assistance of this kind in carrying out his duty will be allowed to the tutor, and must be paid out of the pupil's property. Again, house property may want repairs, and there may not be enough ready money belonging to the pupil wherewith to pay the builder and the carpenter. Perhaps the tutor, in the goodness of his heart, puts his hand in his pocket and pays, so as to save the property from falling into disrepair. The pupil will be obliged to pay him this money. And, indeed, not only is the pupil personally liable, but the property is liable. It is just as though the tutor had a bond on the houses for the amount of his expenditure.

*The tutor's office comes to an end*, as I have said before, at the age of fourteen when the pupil is a boy, and of twelve when a girl. I have met many people who cannot understand why the ages should be different. The reason is historical, and takes us back two thousand years and more, to the days even of Horatius, who "kept the bridge, in the brave days of old," five hundred years before the Christian era. The Romans had the law of tutorship almost exactly the same as I have explained it as applying to Scotland, and with them tutorship terminated when the pupil attained the age of puberty, *i.e.*, the age at which, according to Nature, marriage is possible. Now in sunny Italy boys and girls develop into men and women at an early age, and the Romans fixed that age at twelve years for girls and fourteen for boys. Now, the Scottish lawyers took the law on this subject and transplanted it bodily into the law of Scotland, forgetting that in their colder clime the age of puberty is much later, especially for girls. And that is how the present ages came to be fixed upon.

After tutorship comes **curatorship**. Now the rights, duties, and liabilities of a curator are not really numerous. In the first place, he has nothing to do with the person of the minor. He cannot control his movements or his place of abode. He cannot prevent him from marrying, if the young man is so disposed. It certainly seems strange that if a mere girl of thirteen wants to marry, and has no father or mother, her curator has no authority to restrain her, and cannot legally interfere to prevent her from becoming the prey of an unscrupulous fortune-hunter.

**How are curators appointed** is the first question to be answered. And the answer is, either by the father of the minor or by the minor himself. The father can, by his will, appoint a curator or curators to act after his death, but a mother cannot. Neither has a mother any right to manage her child's affairs after the father is dead and the child has attained fourteen (if a son) or twelve (if a daughter).

Now for the appointment by the minor himself. This is how it is done. He cites to come before the Court of Session, or the Sheriff Court, his two nearest of kin (*i.e.*, by blood and not by marriage) on his father's side, and the two nearest on the mother's side. These four appear—or their lawyers appear for them—on a certain day, and on that day the minor chooses his curator or curators in Court. He need not choose one of the four, nor any relation at all. Why are the four relatives there, then? Well, it is a precaution to prevent the minor, who is only a mere youth after all, from choosing someone who is flagrantly improper, or someone who has acquired an undue influence



over him, and has persuaded or compelled the lad to name him as his curator, for the purpose of laying his hands on some of the lad's property.

Old Scottish lawyers could tell of cases where it has happened to a young man to fall into the hands of a plausible scoundrel who, partly by flattery and partly by bullying, has acquired such an influence over his poor dupe that the young fool would do anything for his "friend." The "friend" soon makes the lad discontented with his present curator, and suggests that he should get rid of that obnoxious person. "He treats you like a baby, my boy," is the argument, and too often it prevails. Then what more natural than that the "friend" should be asked by his victim to be curator himself? And what more natural, again, than the "friend," after many objections, should suffer himself to be persuaded? "I can't refuse you anything, dear boy." So the first curator is dismissed, and the "friend" takes his place—which reminds one of the old story of the wolf being employed to guard the sheepfold. Why prolong the story? The poor sheep is sure to be eaten. It is only a question of how much will be left on the bones.

Now the Scots law is wary enough, and it tries to guard against such mischief as I have indicated by causing the minor to summon his four nearest relatives to be present at the choosing of a curator. They are supposed to be there to object to the chosen one if they think he is a wolf, and if they can show that such is his character, the Court will refuse to allow him to act. But if the relatives do not come to the Court, or do not raise any objection when they are there, the minor's choice will be confirmed by the judge.

**The duties of curators**, as I have said, only relate to the property and not to the person of the minor, and so far they are similar to the duties of a tutor. The curator must make an inventory of the minor's property. The penalty for not making such an inventory is that the curator is not to be allowed credit for any expenses incurred by him in his ward's affairs—at all events, any legal expenses.

The word "curator" means one who takes care, a custodian. It is a Latin word, and is derived from *cura*, which means care. The etymology conveys an accurate idea of the great duty which is placed by the law upon one who undertakes the office, for his function is to take care of the minor's property, and to safeguard his interests so far as they relate to this world's goods. The question is, "How?" The Scots law first of all allows a minor to act for himself. Minority is not, like pupillage, a state of total incapacity. As I have shown, the tutor acts for the pupil, who has no will of his own in the matter. A curator, on the other hand, has only power to consent to acts of the minor. He cannot compel the minor to do anything, however advantageous. On the other hand, the minor cannot compel the curator to give his consent to any act which he (the minor) proposes to do. In practice, it comes to this: the curator manages the property, but if he wants to do anything in connection with it, he must tell the minor all about it, advise him to the best of his ability, and then the minor must do the act and the curator must give his consent. Thus: A, the curator, thinks it would be to the advantage of B, the minor, to sell a plot of land. A makes inquiries about it, and tries to get a purchaser.

Then he tells B. B can refuse to have anything to do with it, in which case the sale is off. But if B, as he usually does, follows A's advice, B, and not A, signs the necessary contracts and deeds, and receives the money and gives a receipt for it. If the buyer pays it, or if A signs the deed, the transaction is null.

Take another case. B (the minor) wants to borrow money. If C lends it to him without the consent of A (the curator), and B spends it on some extravagances by which he does not do himself any good—as on betting, or gambling, or in buying a yacht which is afterwards wrecked, or purchasing a valuable horse that goes lame or dies—C will not be able to sue B for the money he has lent. On the other hand, if A consents to the loan, B is bound to repay it. The consequence is that all who lend money to minors, or who sell them goods, or buy from them, are taking a great risk if they do not procure the assent of the curator. If they lend money and it is wasted, they cannot demand repayment. If they sell goods and they are wasted, they cannot sue for the price. If they buy and the minor wastes the money, he can ask for his property back.

Take this case, again. A minor married, and made a marriage-contract by which she agreed to part with her rights over her property in favour of her husband. When she came of age she asked to have this contract set aside and to be restored to her former rights—in other words, that her husband should be compelled to give back her property—and this was granted without hesitation. Her curator had refused his consent to this marriage-contract, because he thought the lady's affection had outrun her discretion. He could not stop her making it, but the fact of his refusing to consent to it enabled her, when she saw her folly, to avert its consequences. And that is the whole duty of a curator—in plain English, to prevent his charge from making a fool of himself. Let every curator bear in mind this legal duty when he is asked by the minor to give his consent to any act or contract. He must not suffer himself to be persuaded or cajoled into giving that consent against his better judgment, for if he does, it is a breach of duty for which he is liable to be called to account. "Calling to account" means paying out of his own pocket the result of his action. And this brings me to another little matter.

Every tutor and curator, except those appointed by the father and mother, must find **caution** (in English, give security) that he will faithfully carry out his duties, and he is also required to take an oath to the same effect. "Finding caution" means that you must produce a friend who will promise to be responsible if you make any default—such as, for instance, embezzling the money belonging to the ward, or allowing him to make a ruinous bargain. Let me repeat that tutors and curators appointed by mother or father are not expected to find caution, because caution is only a means of securing fidelity, and the father or mother, by appointing a man, shows confidence in that fidelity.



## CHAPTER IV.

### MISTRESS AND MAID.

The "servant question"—The position of a domestic servant—"Menial" not a word of reproach—What servants are domestic—Notice to leave—The length of the engagement—Scots law of notice to leave—Dismissal without notice—Disobedience—Misconduct—Drunkenness—Habitual neglect of work—Incompetency—Permanent illness—Sickness itself does not put an end to the service—*Leniter imposuit manus*—The Irish interpretation—The servant leaving—When lawful to leave without notice—Ill-treatment—Starvation—Cruelty—A bad house—Hard words break no bones—Death of the master—Duties of servants—Obedience—Doing the washing—Reasonable orders—The cap question—Insolence—Honesty—Carefulness—Rights of servants—Breakages—Good food—Board wages—Ordinary wages—Characters—Searching a servant's box—Detaining a servant's box.

ONE of the most interesting questions to the middle-class household is "the servant question," as it is called in the parlour, or "the mistress question," as it is called in the kitchen. Without any wish to be impolite or ungallant, I state it as a fact that women rarely work well together, and that between mistress and servant friction is far more frequent than between master and servant. Perhaps this arises from the nature of the relations between them. The mistress of a middle-class household is brought into such close relations with the maid that differences of opinion are bound to arise sometimes, and frequent contact between people who are not in agreement is sure to aggravate the disorder. It is none of my business to lecture mistresses on the duties of forbearance and kindness towards others; but perhaps I may remind them that in law servants are not "dependents." They give work in exchange for money, food, lodging, and so on. Surely, that is a sufficient *quid pro quo*. It is in law, at all events, and the master and mistress are just as much under legal obligations to the maid as the maid is to them.

It is of some importance, first of all, to find out what a menial, or, as we usually say, domestic servant is. The word *menial* is the more strictly correct of the two, and it does not mean, as some imagine, a servant or person of low degree. It is derived from the French word *ménie*, which is used by Chaucer in the English form, *meyne* :—

"And in her hows she abode with such meyne  
As to her honour nede there was to holde."

*Troylus and Criseïde: Book I.*

Here it signifies household, and the true meaning of menial is a household servant. When the service contracted to be rendered is of such a nature "as to require the servant to be frequently about his master's person," or about his house or grounds, the servant is a domestic.

So all indoor servants, whose duty it is to attend the master or mistress and

perform household duties, are clearly domestic. For instance, a housemaid, cook, general servant, and footman, are domestic servants. They always, or almost always, live in the house, and in any case perform their duties in the household. A valet, again, and a lady's-maid are domestic servants, because their work is entirely connected with the *person* of the master and mistress. But on the one hand there are many servants who "live in" who are not domestic, and many who "live out" who are. A governess who lives in the house is not a menial servant, nor is an apprentice, nor a shop-assistant, because the duty of the first is to teach, and the duties of the second and third are to help in the business of the employer. But a head-gardener, who has £100 a year and has to live in a house within his master's grounds, is a menial. So is an under-gardener, and a groom, and a coachman, because their duties lie within the boundaries of their master's grounds, or else consist of personal attendance on him and his household. But although a gardener is a domestic servant, a farm bailiff is not, neither is a steward, nor a private secretary, and it has been held that a manageress of a hotel is not a menial. Servants in husbandry also are not menials—*e.g.*, a ploughman or a shepherd, even though he lives at the farmhouse.

I have discussed this subject at some length because it has an important bearing on the question of what the service is in law, and how much notice must be given.

The word menial is now used in a derogatory sense; but by the old law of England as it has stood from time immemorial, *a servant was looked upon as a member of the master's family*. "The hired girl," as they say in America, was supposed to stand in the affections of her master and mistress next to their own children. I have told you that a father can defend his children's safety by whatever physical force may be necessary for the purpose. To show how the law always has regarded the domestic servant, let me say that a master (or mistress) is justified in defending a servant as he would his own child. Put in legal language this reads: "A master may justify an assault in defence of his servant." Put by way of practical illustration it works out: A master sees his servant attacked by a stranger. He joins in the affray and strikes the servant's antagonist. In ordinary circumstances this would be an assault on the stranger; but struck in the defence of a servant the blow was justifiable. The master is not supposed to pause and inquire who is in the right. It is enough for him that his man-servant or his maid-servant is likely to be hurt. He need not even follow the example of the Irishman, who, coming on a row, politely addressed one of the combatants, "Excuse me, sir, is this a faction fight, or may I join in?" In the old days, one of the duties of a master was protection, and the idea lingers in the law of the present in the doctrine I have been endeavouring to explain.

I shall treat of the subject-matter of this chapter under the following headings:—(1) The Contract of Hiring and Service; (2) How the Contract may be put an end to; (3) The Duties of Servants to Masters and Mistresses; (4) The Duties of Masters and Mistresses to Servants.

**Notice to Leave.**—Many rather hazy notions exist both amongst mistresses and maids as to the notice that must be given to put an end to the service. I should like to explain the law on such an important topic, so that all readers of *The Family Lawyer* may be clear about it in the future. When you, Mrs. B, hire a



general servant, for how long do you hire her? And when you, Mary, consent to go to Mrs. B's, for how long do you let yourself to hire? Perhaps it never struck either of you. You never thought about it. You had a hazy sort of notion, perhaps, that Mrs. B can get rid of Mary by giving her notice, and that Mary can put an end to the contract by giving Mrs. B notice. But that does not affect the question, which is: When the agreement was made, how long was it for?

The answer, I know, will surprise many. The agreement, unless something appears to the contrary, is for **one year**—subject to the fact that either party can terminate it before that year is up by giving a **month's notice**. When the year is up the service is done, and the engagement at an end, so that the servant may leave, or the mistress may tell her to go without notice. It is just the same as if I hire a horse for a year, subject to returning it on giving a month's notice. By giving my notice I can put an end to the hiring at any time, but at the end of the year it expires of itself.

There is one superstition I desire to remove. On inquiry from twenty mistresses and an equal number of servants, I found they all believed that the servant or mistress must give her notice on the day when the month's wages fall due. Thus, if I hire Jane as my housemaid and she comes on the 1st of January, her first month's wages are due on the 28th of that month (four weeks). If in the first week of her service I find her to be unsuitable for the place, it is supposed that I must give her notice on the 28th, that is, when I pay the wages. This notion is entirely erroneous. I can give the girl notice *any day* I like, and she has equal liberty to give me warning any day she likes. The date of payment of wages has nothing at all to do with it.

The same rule applies to all menial servants, but not to others. It is difficult to say what kind of notice you ought to give your governess, for instance, or how much notice she is compelled to give you if she does not wish to remain. The governess is engaged by the year unless it is otherwise agreed at the time when she is hired. So if you have a private tutor for your son, he is engaged for a year unless otherwise agreed. In these cases, as a rule, three months' notice is required; but this, again, may be varied by an agreement made beforehand. The best thing is to *make an express stipulation* as to notice at the time the engagement is entered into.

IN SCOTLAND the law is different. Unless a servant is hired for a time specially agreed on, he or she is understood to be engaged for **six months**. As in England, however, the contract may be put an end to at any time by giving notice on either side.

The notice required by the Scots law is **forty days**, and not, as in England, a month. It should be observed, however, that a farm-servant is not a menial or domestic servant, and he or she is hired for one year, with the option of giving forty days' notice at any time.

Both in England and Scotland there are plenty of good mistresses whom girls do not wish to leave, and plenty of honest hard-working servants whom mistresses do not want to part with. If the hiring is only for a limited time—a year in one country and six months in the other—how does the case stand

when a servant does not wish to leave at the expiration of that time? The answer is simple. By the *mere fact* of the servant remaining after her twelve or six months, and the fact of the mistress not telling her to go, a fresh hiring is made for another period of the same length as the first, and on the same conditions. Thus, if I, living in London, engage a cook in January, 1895, and do not specify any particular time of service—and everybody knows how unusual it is to say, "I engage you for a year"; one generally says, "I engage you at £20 a year"—she is understood to come into my service for a year. She being a good cook, and I (let us hope) a good master, January, 1896, finds her still in my kitchen. Neither of us say anything, but she stays. It is just as though I had gone to her and made a fresh contract, saying, "I am willing to engage you again at the same wages you are now receiving."

**Dismissal Without Notice.**—I advise both mistresses and maids to pay attention to what I am about to say to them on this topic. A master or mistress can dismiss a servant without giving any notice—or, as it is popularly called, "at a moment's notice"—**without giving any reason** for it. But a month's wages must be given in lieu of the ordinary month's notice. There are circumstances which will justify the mistress in dismissing her servant not only at a moment's notice but *without the month's wages* in lieu thereof. The girl is, however, generally entitled to her pay for the time during which she has been at work.

These circumstances may be grouped into five classes, which we will consider one by one. In the first place, **wilful disobedience** to orders from the master or mistress will justify them in telling the girl to pack up her box and go at once. I do not want any mistress to run away with an extravagant idea of her authority; so let me say that a mere refusal to do one particular act does not amount to such disobedience as will justify instant dismissal. A great judge once said, "It is not every failure in faithful service which will warrant a master in discharging his servant." By this sentence Lord Bramwell meant that only repeated disobedience will justify dismissal without notice. One of the Law Reports contains the story of a servant-maid who had a sick mother. The girl persisted in leaving her master's house at all hours of the day and night in order to visit her parent. The mistress told her not to leave the house again without permission, but in defiance of repeated orders she went again and again. Then the mistress sent her away without notice, and without wages in lieu of notice, and when the girl brought an action for those wages it was decided that she had no right to them, and that the mistress was entitled to act as she did. Bear in mind that if the servant had only disobeyed orders once, the mistress could not have dismissed her summarily and without compensation. It was the continued disobedience that justified instant dismissal.

The second class of cases comes under the head of **gross moral misconduct**. A mistress may discharge at a moment's notice a servant who is guilty of theft. If a maidservant is found to be pregnant, she may be sent away instantly—and so may a manservant who has become the father of an illegitimate child. But the fact that these things have happened *before* the servants have entered your service does not justify your dismissing them at a moment's notice without a



month's wages in advance. They must conduct themselves properly so long as they are with you. Legally, that is all you have any right to expect. **Drunkenness** is another good ground for sending a servant about his business. In all these cases of gross misconduct not only may you dismiss your servant without wages in advance, but all that has accrued since the last pay-day is forfeited. For instance, if you pay the wages on the 1st of the month and on the 15th you discover such evil behaviour as I have mentioned, you are not bound even to pay the wages up to the 15th.

A third case for dismissal is **habitual neglect of work**. Understand, I say habitual. For a mere temporary fit of laziness—a day or two, for instance—will not entitle a mistress to take such a stern measure.

The fourth ground of dismissal at a moment's notice is **incompetency to do the work** which the servant is hired to do, for he who cannot is much the same as he who will not perform his duty. But this rule must be very carefully applied in the case of ordinary domestic servants. Every girl must begin somewhere, and she generally takes the situation at low wages at first, demanding higher pay as she gains experience. So that if you hire a general servant or a housemaid at low wages and afterwards find her incompetent, you must put up with her blunders or else give her the usual notice. *The law looks at the contract reasonably*, and asks, "Did you really expect to hire a skilled servant for £5 a year?" And if you reply, "Yes, I did," then the law says, "Incredible. But even if you did, do you think the girl meant to represent that she was a thoroughly skilled servant, at the same time being willing to accept £5 a year?"

If, on the other hand, you advertise for an experienced maid, and offer wages such as a skilful girl would be likely to accept, you are entitled to that skill for which you pay. Again, if you engage a cook who sends up your joint burnt one day and only just warm the next, who boils your fowl to rags and grills your cutlet to a cinder, you are justified in supposing that the man (or woman) cannot cook, and may dismiss him (or her) at a minute's warning. A servant who sets up to be a cook ought to have some idea of the culinary art. I recommend any young woman who applies for a situation as cook for the first time always to tell the mistress that she is only a beginner—with a good idea of the work, it may be, but without any actual experience.

The fifth ground of discharge without notice is **permanent incapacity from illness**. Note the word "permanent." For if the servant is merely ill for a few days, and so temporarily disabled from doing her duty, she cannot be discharged without notice. On the other hand, if the illness is a serious one, and likely to last for some time—as, for instance, typhoid fever—the contract may be put an end to at once. Wages up to the date of dismissal must be paid, because the servant having faithfully performed her share of the contract so long as she was able, and the mistress having had the benefit of her work, that work must be paid for.

The reason why permanent or lengthened illness is a ground for dismissal, while temporary sickness is not, may be seen on a little consideration. The real question always is, What was the intention of the parties when the service was entered into? It is, of course, impossible, or nearly so, to provide by actual, express words for everything that *may* happen during the period of service, and so,

when the two parties have not made any stipulation on any particular point, the judges always fall back on reason. They say, "We must suppose these two people to be reasonable beings, and therefore we must suppose them to have intended to mean what is reasonable." Now, it is clearly unreasonable to dismiss a servant-maid because she lies abed for twenty-four hours with a bad cold, or is laid up for a week with a sprained ankle. On the other hand, it is quite reasonable that you should be able to dismiss a maid who is likely to be unwell for a month or more, because you will probably be obliged to take somebody in her place.

I want all mistresses to be careful to avoid mistakes on one point. The illness, however long, does not of itself put an end to the service, but the master or mistress must give the servant a dismissal. Let me show you what I mean. Mrs. Smith engages Mary Hodge to be her general servant. One day Mary falls sick of small-pox, and Mrs. Smith sends her to the small-pox hospital, but does not say or write a word to anybody about dismissing Mary. At the end of two months the girl comes back, able and willing to work; but her mistress refuses to take her, tells her to remove her belongings and leave the house. Mary is entitled to a month's notice or a month's wages from that time, and also to her wages for the whole time she was in hospital. I had occasion to tell this to a client the other day, and he was somewhat astonished. "How does that come about?" he asked. "You say I could have dismissed her on the spot when I found out she had small-pox, or could have written to her when she was in hospital and dismissed her at a moment's notice." "Yes," I replied, "*but you did not*. You were entitled to dismiss for permanent incapacity, but while that incapacity lasted, you did nothing. You are not right in dismissing for disablement when the disability no longer exists."

The matter stands thus :—

1. I hire a servant for a year—that being the period when no other is specified (in Scotland, six months).
2. Therefore the service continues for a year (six months in Scotland) unless it is terminated properly before.
3. The service can be properly terminated by a month's notice or a month's wages on either side, or by instant dismissal for misconduct, disobedience, permanent illness, etc.

4. If there has been no notice or month's wages, no instant dismissal, and the year (or, in Scotland, six months) has not expired, the service is still continuing.

Argal, as the grave-digger says in *Hamlet*, wages must be paid for the time the servant was away ill, because, although absent, she was still in your service.

I was visiting at a house one day, when my host came to me and said, "Mr. Family Lawyer, I want your advice. There is a disturbance in the kitchen. The cook is very drunk, and has been insolent to my wife. I ordered the woman to go at once, but she refuses to move, and declares that if I touch her she will 'have the law of me.' What am I to do?" "Give her half an hour to pack up her things," I replied, "and then put her out. Use no more force than is absolutely necessary, but just sufficient to remove her outside." "But she says she'll 'have the law of me.' Are you quite sure I shall be right in removing her by force?" "Quite sure," I said. And he would have been justified in ejecting her forcibly,



even had she not been intoxicated, for the law is that when a master tells a servant to go at once, and the servant declines to go, the master may always use gentle force to rid his house of the intruder. For a discharged servant, whether discharged rightfully or wrongfully, has no more business in the house than a stranger who, seeing your front door open, walks into your dining-room. In one case as in the other you have the right to eject the intruder, provided that you use no more force than is necessary. As the legal phrase has it, *leniter imposuit manus*—"he gently laid on his hands."

There is a good story told about *leniter imposuit manus*. An officer in Dublin once had a "row" with his servant because the latter was insolent. "Leave the house at once!" cried the officer. "I shan't," the servant replied. Whereupon the gallant captain ejected his man in no very gentle manner, and for this the servant brought an action, claiming damages for assault. When the case was tried, the barrister appearing for the master, a gentleman famed in the profession for his silky manner and softness of speech, thus addressed the jury: "Gentlemen, I submit to you that this case has been grossly exaggerated. What happened was, that the plaintiff was insolent to my client, and refused to leave the house. My client then, as he had a perfect right to do, *leniter imposuit manus*, and put the fellow out." The plaintiff's counsel followed: "Gentlemen, according to my learned friend, the defendant *leniter imposuit manus*. I don't suppose that many of you, gentlemen, understand Latin, and you will therefore require a translation. Gentlemen, translating it by the conduct of the gallant officer, it means, '*he seized him by the scruff of the neck, kicked him well, and threw him downstairs.*'" I need hardly say that this translation was received with much merriment, and the defendant had to pay heavy damages because *leniter imposuit manus* in the way described.

So far I have considered the question of termination of the service from the point of view of dismissal—that is, where the master or mistress puts an end to the contract. Now let me consider it from the point of view of *quitting the service*—that is, when the servant puts an end to the contract.

There are **three lawful ways by which a servant may put an end to her contract of service**. They are: (1) By giving a month's notice; (2) By paying to the employer a month's wages, and then leaving at a moment's notice; (3) By leaving at a moment's notice after the master or mistress has broken the contract. If a servant leaves her situation without a month's notice, or without paying to the mistress a month's wages, or without some serious matter of complaint, her quitting the service is unlawful. The third heading is the only one necessary to look into closely, as I have said all there is to be said about notice under the heading of "Dismissal" (pp. 97-8). I will show you now the cases when a servant will be justified in throwing down her broom and shovel, her cap and apron, and demanding her wages up to date. The chief instances come under the head of

**Ill-treatment.**—There are masters and mistresses, unfortunately, so destitute of ordinary feelings of humanity as to starve their servants. There are others who do not actually starve them, but do not give them sufficient food to keep them vigorously healthy. Others, again, are not particular about the quality

of the food eaten in the kitchen. I have heard of households where the servants' food consisted chiefly of diseased potatoes and ancient fish. I know of a rich old lady, who died worth £300,000, who kept two servants and fed them on bread two weeks old and a quarter of a pound of cheese per fortnight—this formed their breakfast. For dinner, in the middle of the day, they luxuriated in the same kind of bread, but with tinned salmon, and salt beef such as sailors use. Very good teeth were required, I was told, to manage that beef. For tea, the same bread spread with dripping of a very ancient fish-like smell. The mistress herself did all the shopping, and carried everything home, so no one ever knew where the things were bought. Nearly all the servants who went to that house gave notice after the first few days, or, acting on their mistaken notions of the law, on the first pay-day. If they had known the law applicable to their station, they could have left at a moment's notice, and demanded all their wages up to date. For instance, a servant who stopped three days could demand three days' wages, and so on. This must appear plain to all reasonable people. A domestic servant must be fed, and *properly* fed. Therefore, if you do not feed your servant or give her money to buy food, you have broken your contract with her, and she can quit your service *instantly*. What right have you to expect her to do her duty if you do not perform yours? Then there is **cruelty**—as, for instance, beating. It is strange, but true, that there are people, even in the present day, who imagine that mistresses have a right to beat their servants, so long as they do them no permanent injury and leave no mark. How they became possessed of the notion I know not. I do know that it is entirely mistaken. A blow from a mistress is assault and battery, and I advise any servant whose mistress "slaps" her, to leave at once, demand her wages, and if payment be not made forthwith, to sue the mistress in the County Court. She may also, if she likes, obtain a summons from the nearest magistrate, and the mistress will be fined more or less, according as the blow was more or less severe.

A third kind of case in which a servant is entitled to leave at a moment's notice is if she discovers that **the house is being used by the master or mistress for immoral purposes**. Respectable girls do sometimes find themselves engaged as servants by women of easy virtue. A servant-maid on discovering that her mistress is a woman of the town may leave without giving the usual month's warning, and may demand her wages up to the date of leaving. Just as a mistress can dismiss her servant if the latter is guilty of immorality, because her evil example might corrupt other members of the household, so a servant can quit if she finds her mistress's course of life to have a tendency to corrupt the morals of those about her. This applies also to a domestic engaged to assist at one of those so-called hotels which are, in fact, nothing more than houses of convenience. I mention this for the information both of servant-girls themselves and of those philanthropic individuals who try, by means of Servants' Homes and the like, to assist young persons of this class.

**A Word of Warning to Servants.**—You are not entitled to leave at a moment's notice merely for *angry words* spoken to you. Hard words break no



bones, any more than soft speeches are efficacious for the buttering of parsnips; and although it is undoubtedly more pleasant to be addressed courteously than otherwise, yet no number of sharp speeches, colloquially termed "nagging," amount to a breach of agreement on the mistress's part. Give a month's notice, by all means, if madam's tongue is too much for you, but on no account leave at a moment's notice, or you will forfeit the wages that you have earned. Besides that, you may have an action brought against you for you to pay your mistress a month's wages in lieu of notice. I will add that never in my experience have I known a mistress whose servant has suddenly left her bring an action for the month's wages, the simple reason being that the game is not worth the candle.

The death of the master puts an end to all contracts of service entered into by him. To all contracts which are purely personal in their nature, the death of one of the parties puts an end. This must be so, if you think of it. Suppose the *servant* dies. How can the contract of service be carried on? Would the master be entitled to say to his deceased housemaid's mother, or sister, or other personal representative, "I shall expect you to come and finish the period of service—to do my work for a month, so as to work out the notice to which I am entitled, or else pay to me a month's wages"? The idea is too preposterous to be discussed. And yet when a master dies and the mistress says, "Mary, I shall not require your services after Monday," I have heard of servants demanding a month's wages in lieu of notice. This case does not look quite so absurd as the other, but it is, in fact, quite as unreasonable. The master, who paid the wages, and whose service the servant was in, is dead. If his representatives were bound to *employ* (or pay without employing) his servants for another month, what follows? Why, surely, that the servant is bound to *serve* those representatives for another month. But those representatives may be people whom the servant cordially dislikes—miserly, crabbed, sour, and generally unpleasant. Is any man or any woman to be called upon to serve people of that kind, whom, moreover, he or she never agreed to serve? Certainly not.

Now, remember that the contract of service is one of mutual rights and obligations. If, therefore, the servant cannot be compelled to serve a master whom he never agreed to obey, neither can the servant compel someone to employ him who never agreed to do so. In other words, because the deceased master's executors could not compel Mary, the general servant, to stop with them until she gave proper notice, neither can Mary demand notice from them.

If, when a master dies, the mistress does not dismiss the servants, but *allows them to stop* without actually and in so many words re-engaging them, there is a fresh agreement of service with the mistress. You can make an agreement without saying or writing anything, and if you, madam, have in your house a servant-maid whose master is dead, and you let this servant-maid wait upon you and you give her orders, you are assuming the position of mistress, and by your conduct you create a contract of hiring and service between yourself and that servant-maid.

## THE RIGHTS OF MASTERS AND MISTRESSES, AND THE DUTIES OF SERVANTS.

A right in one person always corresponds to a duty in another, and that is why I speak of the rights of the mistress and the duties of the servant in the same breath. The first right of the mistress is to *give her orders*, and this right corresponds to the first duty of the servant—namely, *obedience*. But it stands to reason that the servant is not bound to obey any kind of order that the mistress may choose to give. If you, madam, order Kitty the housemaid to go up in a balloon with you, you must not expect to be obeyed. Neither can you complain if she refuses to marry Robert, the footman, at your command. Doubtless you will reply that you did not want *The Family Lawyer* to tell you that. But how about the time when you ordered Kitty to give up her sweetheart, the milkman? Did you know you had no right to do that, either?

**No followers allowed** is quite a proper rule, so far as it goes. You must be careful, however, to confine it to your own house and grounds.

Let me define at once the limit of a mistress's right to command and a servant's duty to obey. **A servant is bound to obey all reasonable orders which come within the scope of those duties for which she was hired.** By the latter part of the definition I mean that if you engage a girl as housemaid you cannot order her to undertake the cooking, even though it be only for once. If you do order her, she is not bound to obey you, because it does not come within the scope of her stipulated service. A cook is not bound to scrub floors, except the kitchen floor. Nor is a gardener obliged to clean the boots.

The most difficult questions arise in the case of the general servant and the handy-man.

Has a mistress the right to ask her **general servant** to do the **washing**? This question has vexed the bosom of many a housewife. She has not, because that is the business of a washerwoman or laundress. The moral is, that in engaging a general servant, if you want her to take the family wash in hand, you should tell her so. She has then a chance to object, and you need not engage her unless you like. But she has no right to object to wash an odd article or two occasionally. Anyone can see the difference between washing a pair of little Bobby's stockings once in a while and undertaking the laundry-work of the whole household. Beyond this it is difficult to mention any kind of work that the useful "general" may not be told to do. I say any *kind* of work, not any amount, for if a mistress orders any servant to do more than a certain amount, she violates the first part of my definition; which naturally leads me to consider what are "reasonable" orders.

The question must be answered in two ways, one positive, or affirmative, and the other negative. The orders must have *something to do with the servant's duties* as a servant, or they must relate to the *moral conduct* of the domestic, or else they must bear on her *conduct in your house*.

The mistress has a right to be obeyed when she tells her servant to do a thing in a particular way, or to do things in a particular order. Thus, one has heard a mistress say—"Maria, you really must not put the knives in hot water. It



spoils the handles." And again—"Cook, you must not use the silver spoons for cooking purposes." And "Maria, I cannot allow you to answer the door in your working apron. You should take it off, and put on a clean one." All these commands are just and lawful, and ought to be obeyed.

Orders as to moral behaviour are within the power of the mistress, who may lawfully command her servant not to go into the company of persons of bad character. And the servant's general conduct and behaviour in the house are also under the control of the mistress, though they may not relate either to the duties of the service or to the morals of the servant. This leads me to the consideration of the great Cap question, which I approach, I admit, with some degree of hesitation. With hesitation, I say, because if I declare in favour of the cap I shall incur the reprobation of the kitchen, and if I declare against it the ladies in the drawing-room will vow that I am fostering a rebellious spirit. Pray remember, fair denizens of the basements, and you lovely dames who inhabit higher and more comfortable regions, that it is not I, but the law, which is to blame.

**Is a maidservant bound to wear a cap?** That is the question. I have heard it argued from both sides. Counsel for madam says, "Yes; if she is ordered to do so she is bound to do it. The order is a reasonable one. It relates to the conduct of the servant in the house itself, for surely to be dressed neatly is part of the conduct of the servant." To this counsel for the housemaid replies, "She is not bound to wear a cap or any other particular dress unless she likes. The mistress may, properly, order the servant to be neatly dressed, but she may not say, 'Wear this or that.' Such an order is unreasonable. Suppose she ordered the girl to wear a dress of the same shape as an Albanian peasant's, and made of patch-work. Clearly the maid would not be bound to obey. Why, then, should she be made to wear a head-dress to which she has a rooted objection?" Then the judge declares the law as follows: **A mistress has a perfect right to order a servant to wear a cap**, and to wear a cap of a particular kind and shape. If the cap is immodest, or so cumbrous and heavy as to give the servant a headache, or so ridiculous as to cause the girl to be a laughing-stock to others, she can refuse to obey; but not otherwise. For instance, if the mistress told her to don a dunce's cap, or a fool's cap and bells, it would be quite lawful to decline to do so. But an ordinary servant's cap is a head-dress that the mistress has a perfect right to expect to be worn. Everybody knows how much better it looks to see the servants of a household dressed uniformly, than if the head housemaid wore a pink silk dress with cherry-coloured ribbons, and the second housemaid a green satin with Honiton lace for trimming, while the head parlourmaid wore a cap because she thought it suited her style, and the second parlourmaid wore no cap at all because she imagined that it was a "degrading badge of servitude." It is perfectly reasonable that they should all be made to dress alike, and it is also reasonable that the mistress should choose the uniform. And if a mistress can regulate her servants' caps if she has twenty servants, why not if she has two, or only one?

For the same reason, a master has the right to require his manservant to dress in a particular kind of dress, or livery, as it is commonly called. Indeed, I never heard this proposition disputed by anyone. Caps seem to be the bone of contention, if I may be allowed to use the metaphor. But although the mistress has a

right to dictate the costume that shall be worn *within* her own doors, she has no right to interfere with the dress to be worn *outside*. It was only the other day that a case was brought to my notice of a mistress who caught her "general" going off on her "Sunday out," wearing a very gay and rather expensive hat and a jacket to match. This mistress ordered the girl to take them off, and declared she would not allow her to go out of the house with such fine feathers on. "You are dressed much above your station," was the reason given. The poor girl point-blank refused obedience, with the result that she was dismissed next morning without a character; and with wages only up to the date of dismissal. Her solicitor advised her to bring an action for wrongful dismissal, and for one month's wages in lieu of notice; which she did, and won.

The third right of the mistress and duty of the domestic servant is that **the mistress should be treated with respect**. This follows from the fact that the mistress is head of the household. A slight want of respectful demeanour once, or even twice or thrice, at long intervals, is no ground for instant dismissal; but absolute downright insolence or continued disrespect may cause the servant to be sent away at a moment's notice. Now, on the subject of insolence I should like to make a few remarks. The woman alluded to a few lines above, who dismissed her servant because the girl's Sunday clothes were too fine, asserted in the witness-box that the maid was insolent. Then the question was put to her: "Did you order her to go upstairs and take the clothes off?"

A.: "Yes, I did."

Q.: "Did she say, 'Excuse me, ma'am, but I am going out as I am'?"

A.: "She said something like that."

Q.: "Do you call that insolence?"

A. (*with great emphasis*): "Certainly I do."

Q.: "Why do you say it was insolent?"

A.: "Because when I told her again to go, she repeated what she said before."

Q.: "Then you say she was insolent because she refused to obey the same order several times?"

A. (*but not quite so emphatically*): "Yes."

I quote this piece of cross-examination to show what strange notions people have. Mere refusal to obey orders will not amount to insolence, unless the refusal is couched in such language or made in such a manner as to be insulting. Least of all is it insolence to refuse to obey an unlawful order, such as this was. And a mistress should remember that insolence must be very palpable, in fact, quite unmistakable, before it will justify the strong measure of peremptory dismissal.

The fourth duty of a servant is to be **honest**.

The fifth duty is to be **careful of the master's property**. I shall deal with the question of breakages when discussing Wages. Now for the

#### RIGHTS OF THE SERVANT AND DUTIES OF THE MASTER AND MISTRESS.

The first right of a servant is **to be paid the wages agreed upon**, and it is the duty of the master and mistress to pay those wages. The servant is entitled to be paid without any deductions. Some masters and mistresses deduct the value of breakages from their servants' wages. This ought not to be done



unless the servant has agreed that it should be. In other words, the mistress has no right to deduct breakages. She can do this: refuse to pay the month's (or quarter's) wages, and then, when the servant takes out a summons in the County Court, counterclaim for the amount of the damage. But the counterclaim will only hold good where the mistress is able to prove that the breakages were caused by the *negligence* of the servant, or on purpose. And it is for the mistress to prove what the negligence was—not for the maid to prove that she was as careful as she could be. I know some mistresses make it a rule to deduct these breakages from wages without inquiring whether the servant is at fault or not. To a friend who adopts this rule I pointed out the other day how illegal her practice was; but she shrugged her shoulders and said she had done it ever since she kept house, and so had her mother—by which I suppose she meant that she should continue in the same course. One day she will find herself in a County Court, and then she will wish very heartily that she had not followed her mother's example. If you have in your household a rule such as my friend has, you must tell all the servants when you engage them. Then, if they accept the situation, they must be prepared to submit to your regulation.

The second right of the servant is **to be supplied with food**. By Act of Parliament it is a criminal offence for any master or mistress whose duty it is to provide food for a domestic servant, unless that servant is on board wages, not to supply such servant with food. And the food supplied must be sufficient in amount and of good quality. I do not mean that anyone must supply her servant with best fresh butter, but what I do mean is that the butter supplied must be wholesome. If it is rancid and injurious to health, the master or mistress is liable to the penalties of the law. The whole gist of the offence is injury to health; and, therefore, if there is nothing unhealthy about the food, and there is enough of it supplied to keep the servant in health and strength, the legal duty is fulfilled.

**Board wages** is an expression signifying a sum of money to cover not only payment for the services rendered but also the servant's food. If a footman, for instance, receives twenty shillings a week as board wages, he is not entitled to ask for anything more. Even if this sum leaves him hardly any balance after paying for his food, he has no further claim on his master, because he has agreed to accept it. This case sometimes occurs: A maid who has been engaged, say, at £20 a year as ordinary wages is asked by her mistress to go on board wages. The sum offered is £20 in addition to the £20 for ordinary wages. The girl objects to take it. Can the mistress compel her to take that amount? In other words, is the girl obliged to give up her claim to be fed by her mistress in exchange for a sum of money out of which she is to feed herself? The answer entirely depends on the amount offered. If that amount is a reasonable one, if it is such a sum as the servant can fairly be expected to live on, the mistress may compel her to take it. And if she refuses to obey, it is a breach of contract for which she may be dismissed at a moment's notice. But if the sum is so small as to be less than a fair living wage, the maid may refuse to obey, and is not liable to be so dismissed.

There is a popular idea on the subject of board wages which I shall be obliged to dissipate. When a servant is dismissed with a month's wages in lieu of notice, he or she frequently asks for a month's board wages. The argument is, "If I had received a month's notice, you would have had to keep me for that month. Therefore if you, for your own convenience, send me away without notice, you are depriving me of the right to a month's food." The reasoning looks well enough, but for some reason or other it is not law. You see, the servant might get another situation the next day, and would then be in the position of being supported by two masters, the former and the present one. I know that the demand has often been made. Sometimes the master has paid, sometimes not; but on the few occasions when the servant has thought fit to go to the County Court about it, he or she has invariably lost the case.

One other fact on the subject of wages may not be generally known. *If the master becomes bankrupt*, his servants have a preferential claim for four months' wages, provided that these do not exceed £50. By this I mean that when the master files his petition, and it is discovered that he owes his cook, for instance, six months' wages at £10 per month, the cook can claim £40 in full, though the other creditors may have to be content with half-a-crown in the pound. As to the other £20, the servant will have to take half-a-crown in the pound along with the rest. This is a special privilege given to servants, because they have not the same means of protecting themselves as other people have. If a man asks me to supply him with goods, I can demand cash on delivery; and if I give him credit, I must take the risk. But if a man engages me as his gardener at £50 a year, payable monthly, I am bound to do a month's work before I can ask for any wages; so that I am really obliged to give my master credit.

#### A SERVANT'S CHARACTER.

No master or mistress is bound to give a servant a character, and it is the safest plan, where you have reasonable suspicion of dishonesty or the like, to refuse to give a character and decline to answer if you are referred to.

The legal trouble generally arises when a master or mistress is referred to by an intending employer.

"DEAR MADAM,—Mary Jones has applied to me for the situation of general servant. She informs me that she was with you for two years. Will you kindly inform me what her character was during that period, especially for sobriety, honesty, and early rising?"

"Yours truly,

" MARIA EDGEWORTH.

" To Mrs. X."

That sort of epistle has been received, I should suppose, by almost every mistress at some time or other. The answer is often difficult to write. In this case, for instance, Mrs. X begins to cogitate in this wise: "Mary was not a bad sort of girl in her way. She was sober enough. She was honest—ah! *was* she honest? I am not so sure about that. Once or twice I had my suspicions about the change when she was sent on errands. And those lace pocket-handkerchiefs that I missed—who took them, I wonder? And I have missed my little gold



brooch since she left. I *know* I put it in the drawer on Sunday. Mary left on Tuesday, and the brooch was missing on Wednesday. I don't see who else could have taken it." And Mrs. X hardly knows in her own mind what to say about Mary's honesty. If she says that she suspects the girl of theft, the consequences will be serious for Mary Jones. For how is she to get a situation again? Moreover, there is no proof that the suspicion is a just one. It may be absurd and unfounded. On the other hand, with that suspicion in her mind, how can she say that she believes Mary to be an honest girl? Now Mrs. X can write one of six kinds of answer. The *first* is, "I decline to say anything." The *second* is to the effect, "As far as I know, Mary Jones is honest. I always found her sober, and she rose early when she lived here." That is the answer I should advise Mrs. X to send. She is not bound in any way to state mere suspicions which rest simply on conjecture.

But if Mrs. X writes, "I *believe* Mary Jones to be honest," she is doing wrong, and both she and her husband (Mr. X) may be liable to Mrs. Maria Edgeworth, as I shall show hereafter. The *fourth* answer is bad, because it runs like this: "I never caught Mary Jones doing anything dishonest, but after she had gone I missed a brooch and some handkerchiefs." The *fifth* is, "I believe Mary Jones to have been guilty of dishonesty, but I have no evidence to prove it." Much the same answer, it will be seen, as the fourth. The *sixth* is plain and blunt: "Mary Jones is sober and industrious, but she is not honest."

It is on the last three forms of answer that the storm may arise. No one is so tenacious of her good character as a domestic servant. And rightly so, for, to her, character spells livelihood. So that Mary Jones is highly likely to bring a libel action against Mr. and Mrs. X. Is she likely to succeed? The answer depends entirely upon the answer to another question, which is, "Did Mrs. X, when she gave the character, honestly write what she believed to be true?" If she did, the letter is privileged, and Mary Jones cannot recover damages, whether the statement be true or false.

"**Honestly write, what she believed to be true,**" is a phrase that requires some explanation. Let me give a few examples on both sides of the line

Mrs. A, in answer to the usual inquiries, wrote that Mary was in the habit of keeping low company. This was false. Mrs. A knew it was false. She wrote it because she had a spite against Mary. You see, Mary was engaged to a very respectable draper's assistant, and once when it was her night out, and the young man was waiting for her round the corner, Mrs. A "stopped Mary's leave," as they say in the army, and the girl, not being in the best of tempers, gave notice to quit. Madam, in a rage, paid Mary a month's wages in advance and sent her packing. Moreover, the mistress took a mean revenge by writing the letter I have alluded to. Mr. and Mrs. A were sued for defamation of character and had to pay both damages and costs.

Mrs. X on being applied to for the character of her old servant, replied that the girl was lazy, also that she (Mrs. X) had heard of the maid having been dismissed from a former situation for misconduct. Here, again, an action was brought, and it turned out that Mrs. X had heard it from her cook, who had heard it from somebody else, who had heard it from somebody else; and, like most rumours, it

had not a tittle of truth in it. It was held to be a rash and reckless statement, and Mrs. X (and her innocent husband also) had to pay.

Mrs. B wrote as follows: "While Mary was with me, several articles mysteriously disappeared. I questioned the girl, and her answers not proving satisfactory, I dismissed her." It turned out that Mary had not stolen the mysteriously missing articles. But Mrs. B had not made the discovery when she wrote the character. An action was brought for defamation; but on its being found as a fact by the jury that Mrs. B only stated what she honestly believed to be true, the judge decided as a matter of law that the letter was privileged. Mary, therefore, lost her action.

Let me recapitulate. A character which may injure a servant and is known to be false, is legally wrong. A character which may injure and is recklessly given is legally wrong, though you may believe it to be true, because it is not honestly given. You have no right to repeat libellous gossip.

In all the cases that I have given by way of illustration, the mistress has written in answer to inquiries. If a master or mistress, without being asked, writes or speaks a bad character for a servant, it is defamation of character unless it is true. It does not matter in the least whether you believed it to be true or not. It does not matter in the least how you got your information. It does not matter whether your intention was good, bad, or indifferent. The only question is—Is it true? You have no right to say what is untrue and libellous about anybody in the world unless there is some duty cast upon you to give your opinion. It is your duty to give an honest opinion of a servant's character *if you are asked to do so by someone to whom the servant has applied for a situation*. Therefore the law will protect you so long as you keep within the bounds of honest and reasonable belief. But if you are not asked, it is no affair of yours; and you poke your nose into other people's business at the risk of that feature.

A little while ago I said that a mistress ought to be careful about giving a good character to a servant, and I promised to explain why. It is because if she gives a good character to a girl whom she knows to be dishonest, and the girl steals from her next mistress, the latter can bring an action against the former mistress for the value of the goods stolen. There is no need for me to expatiate on this. It is a well-known principle of law that if I make a statement to you which I know to be false, and you believe me and act upon the strength of my information, you can make me compensate you if you lose by it. And I think in this case everyone will admit the justice of the law.

When a mistress has given a servant a good character and afterwards discovers that the character is undeserved, what ought she to do? I refer to a case of this kind: A butler has left his situation, his master and mistress both believing him to be a man of honesty and integrity. While in such a belief they are applied to for a character, and they write stating that they always found their old servant honest, industrious, and so on. But after this letter has been sent, it is discovered that the butler was not honest, that he stocked the cellar with inferior wine, though his master paid for the best, that



he had stolen some of the plate—in short, that he was a thief and a swindler. Ought the old mistress to write to his new employer and say that the character given was all wrong? Or, not wishing to punish the man, ought the matter to be allowed to drop? It seems to me that ordinary morality dictates the answers to these questions. Certainly a letter should be written at once to the person who made the inquiry, telling the real truth. It is just as great an offence in law not to correct a “character” when you find out that it is false, as to give a false one in the first instance.

The ways of the wicked are many and strange. A servant who was under notice to quit wrote applying for another situation, giving her present mistress as a reference. The lady to whom she applied wrote to the present mistress for a character, and received an excellent one by return of post. According to this character the servant was a perfect paragon. Her honesty especially was above suspicion. Why was she leaving? Oh, simply to better herself. The perfect maidservant was engaged by her new mistress, and behaved well enough for two or three months. Then things began to disappear. Handkerchiefs were “lost in the wash”—somehow it was always the best lace handkerchiefs that went so unfortunately a-missing. Other articles also vanished from drawers and cupboards. At last a sealskin cape or mantle went astray, and then the mistress's ire was aroused, and she searched her servants' boxes. In the trunk of the pattern girl was found the missing garment, but not that alone—there was a most astounding collection of small articles of plate and jewellery. Away went the lady to the house of the former mistress, and indignantly demanded how she came to give a character for superlative honesty to a woman who was evidently a professional thief. “I gave no such character,” was the reply; “I gave the girl notice to leave because I found her pilfering.” Luckily the new mistress had not destroyed the letter, and on its being produced the former mistress denied the handwriting. Scotland Yard was called in to assist, and a detective at length discovered how it was done. The thief had kept an eye on the letters delivered at the house, and had stopped and opened all that came addressed to her mistress until the right one arrived. Then she called in the aid of a confederate, who answered the communication on notepaper stolen for the purpose. The perfect paragon was sentenced to a term of five years' penal servitude for theft; and the polite letter-writer had to serve twelve months with hard labour as a reward for his pains.

**A mistress has no right to search a servant's box**, even if she have good ground for believing stolen property to be there. I know it is often done, and servants submit to it quietly; but if a maid should object, the mistress has no right to insist. Is there no way, then, for a mistress who has missed things to have her servant's boxes searched? There is, and there is not. If the mistress wants her servant's boxes searched and the servant declines to allow it, the only remedy is for the mistress to go to a magistrate, swear that such a thing is stolen, and that she believes the servant to have stolen it. Then the magistrate can issue a search-warrant for a policeman to search the girl's box. Of course, the mistress must be very sure of her ground before she takes a step of this kind, for should she turn out to be wrong, and to have no reasonable

ground for her suspicion, she and her husband will be liable to an action for malicious prosecution.

If a mistress searches a servant's box without asking leave, or against the maid's will, an action can be brought for what is called "trespass to goods." Trespass to goods is where you wrongfully touch or interfere with any goods belonging to another. It is wrongful to interfere with anybody's property—servant or no servant—without that person's permission, or without a legal warrant.

Another point frequently in dispute is the mistress's right to detain a servant's box. You often see in the newspapers accounts of young women applying to the magistrates for assistance in this respect. A young woman will take a situation, and quarrel with the mistress the very first day. The mistress then turns her out, and will not let her take her belongings with her, alleging that the girl has broken the contract, and ought to pay a month's wages in lieu of notice. I hope none of my clients will ever act in this way, especially when I tell them that their conduct would be without the slightest justification in any circumstances whatever. This, I hope, is sufficiently emphatic. A mistress can never detain property belonging to a domestic servant, whatever the latter has done. I was present in a magistrate's court in London when a mistress was summoned for detaining a discharged servant's box of clothing. "Why do you not give it up?" asked his worship. "Because she refused to allow me to search the box," was the reply. "Do you charge the girl with stealing anything?" the magistrate inquired. "Oh! no, sir; but I always search my servants' boxes before they leave, to make sure." His worship made a few remarks which obviously made the lady feel uncomfortable, and then he ordered the box to be delivered up immediately, and the lady to pay the servant's costs.



## CHAPTER V.

### LIFE INSURANCE.

**Insuring early—Advantages of insurance—Insurance for wife and family not forfeited on bankruptcy—Wife insuring husband's life—An investment—The contract of insurance is a bet—Insurable interest—A curious wager—Strange insurances—Not always legal to insure another person's life—Whose life you may insure—Amount of insurance—Choosing an office—Profit-sharing policies—How to insure—The proposal—Answering questions—Necessity for truthful answers—What is an untrue answer—Your present state of health—Duty to disclose everything—The issue of the policy—Conditions of the policy—Payment of premiums—Foreign travel—Dangerous occupation—Suicide—Dying by the hand of Justice—Indisputable policies—Working men's life insurance.**

I AM treating of Life Insurance under the Law of the Family Man, because as a rule a man does not insure his life until he marries, and when he does insure, it is generally by way of making provision for his wife and family. I do not think it wise for a man to put off this way of providing for those who are to come after him until after he is married, and the reason is obvious. Not only must an increased rate of premium be paid if one is older, but something may happen at any time to increase the risk, so that the insurance company either refuses to insure altogether, or else demands a higher rate of premium. Think of the numbers of young men you know who are hale and sound at twenty-one, but who, in consequence of serious illness intervening, are almost wrecks at twenty-eight. At the latter age they are almost uninsurable, sometimes quite. Had they insured immediately on attaining manhood they would have been taken at ordinary rates, and the subsequent illness would have made no difference to the amount annually payable to the company.

Even if a man does not marry, and has no one to provide for after his death, a life insurance policy will not be wasted. Young men whom I have advised to insure their lives early have made replies of this kind, "I do not intend to marry," or, "What is the good of life insurance to a bachelor?" The true answer to this objection is twofold. First, no one can ever tell whether he will marry or not. The case is before me at the moment of writing, of a bachelor of fifty summers, who after being a confirmed woman-hater all his life, fell a victim to the charms of a German chambermaid, and married her in less than two months from the day they first met. And I could tell you of scores of cases on very much the same lines. Therefore, as a lawyer and a man of the world, I am amused when I hear a young man of twenty-two or twenty-three declare for perpetual celibacy. Perhaps his first love has proved unkind. Let him console himself. It is only "pretty Fanny's way," and he will get over it before long.

The second thing to be said is, even if you adhere to your monkish vow, a

*policy of life insurance is a good investment.* You may want to borrow money some day. I hope you will never be under that painful necessity. But if you are compelled to solicit a loan, you will find it far more easy to borrow on the security of a life policy on which you have paid a few years' premiums than you will on personal security. I know, because I see it advertised in the papers every day, that there are dozens, if not hundreds, of "private gentlemen" who relieve the monotony of their privacy by lending money on note of hand alone and without security. But these benevolent fairies hardly ever charge less than sixty per cent. interest, and you might find it more advantageous to borrow from someone who preferred security, and was willing to lend at seven and a half.

**The advantages of life insurance to the family man** are very great, and render it the very safest way of providing for wife and family. I am assuming, of course, that a safe office is selected for the investment. I shall have a word or two to say hereafter about how to ascertain the financial position of an insurance office ; but I will assume, for present purposes, that you have selected a sound one.

The first way in which a life policy is peculiarly advantageous as a provision for the family is that if the policy is *expressed* to be for the benefit of the wife, or the children, the policy is not subject to the man's debts. Let me make this clear. Robinson insures his life for £200. After paying the premiums for years he fails in business, and his affairs are wound up in the Bankruptcy Court. His creditors, as you are aware, will take everything that he has and share it amongst them. They will even take his insurance policy if he has made it for *his own benefit*. But if he has made it *expressly for the benefit of his wife or children*, the creditors cannot touch it. Again, even if Robinson does not go bankrupt, but has an action brought against him and is ordered to pay debts and costs, or damages and costs, he may not have enough ready cash to meet the demand. His opponent can then lay hands on anything belonging to Robinson, until the debt and costs are satisfied. For instance, he may "attach," as it is called in England, or "arrest," as it is called in Scotland, any money or security of Robinson's which is in the hands of a third party. If Smith owes Robinson money, the opponent can compel Smith to pay it to him instead of to Robinson. But a life insurance policy taken out by Robinson for the benefit of his wife and children is secure from attachment and arrestment. Again, when Robinson dies, the money due on such a policy will *certainly* be paid to the wife or children for whose benefit it was taken out, even though the rest of the property may not realise enough to pay Robinson's debts. There is no other way of investing money after you are married by which you can make such an absolutely certain provision for your wife and children. For it does not matter how poor you are at the time of your death so long as you have contrived to keep up the premiums.

To take advantage of this privilege you must carefully bear in mind that it is necessary to take out the policy in *your own name*, but *payable* to your wife and children. When you go to insure your life you will be asked to fill up a proposal form. This form consists of a number of printed questions, the answers to which you are required to fill in. One of the questions is always to this effect :—"To whom is the policy money to be paid ?" You should fill this in thus :—"To my widow," or, "Half to my widow, and the other half equally



amongst my children," or, "Equally amongst my widow and children." By so doing you will render the policy **absolutely free from your own debts and liabilities.**

If you write, "To my executors," or, "To my next-of-kin," the insurance policy will be considered part of your own property, and as such will be liable for your debts, both during your lifetime and after your death.

A wife can also insure her life for the benefit of her husband or children in the same way so that it will not be subject to her debts. A woman who intends to do this must be careful to make the money payable to her husband or children, and not to her executors or next-of-kin.

The second advantage of life insurance is that you are allowed to deduct the premium when you make your income-tax return. For instance, if you are in receipt of a salary of £200 a year, you will be liable to pay income tax on £40. But if you are paying £10 per annum for life insurance you will be allowed to deduct that £10, thus paying only on £30.

Life insurance, then, is a way of investing your money—a way advantageous to anyone, but doubly so to the family man. Now let me tell you something about life insurance that may seem strange, but is, as I shall soon show you, quite true. *Life insurance is nothing more or less than a bet.* I expect you to open your eyes very wide at this, because most people think that a bet has something to do with horse-racing, card-playing, billiards, or some other amusement. But it is not so. A bet, or wager, as it is more correctly called, is a contract whereby one man agrees to pay a sum of money if a certain event happens. In return, the other man agrees to pay a sum of money if the event does not happen. This is the kind of bet made on horse-races. Now imagine the owner of a horse (Mr. X) making a bet with Mr. A in these terms: "I will back my horse Beauty to run two hundred miles without stopping. Do you agree to pay me £2 for every mile he runs, if I agree to pay you £500 if he does not accomplish the whole distance?" Mr. A accepts. Beauty runs one hundred and fifty miles, for which Mr. A has to pay one hundred and fifty times £2 (£300). Then the horse is blown, and stops dead. Mr. X now has to pay £500, thus losing £200.

In the light of this illustration, take the case of a man of twenty-five years of age who insures his life for £500 at a premium of £10 a year. Practically he says to the insurance company, "I will pay you £10 a year so long as I live if you promise to pay my executors or nominees £500 when I die," and the company agrees. If the insured lives a long time, the company gains; if he dies soon, the company loses. It is nothing more or less than a bet on the length of a man's life.

It is because life insurance is a wager and purely speculative that provision has been made by the Legislature to prevent, as far as possible, *speculations on the death of other people.* What I mean is this: You may insure *your own life* for as much as you like, but you cannot insure *the life of another person* for your own benefit unless you have some interest in that person's life. By this is meant that if you contract to pay premiums during the life of Jones, on condition of receiving so much when Jones dies, the policy is illegal, unless,

at the time you took it, it was to your pecuniary interest that Jones should live. For instance, he may have owed you money, and in that case it was clearly to your pecuniary interest to keep him alive so that he could pay you back. But you must have some actual, substantial *monetary* interest in Jones's existence, or else you have no business to insure his life. The law encourages life insurance to provide for wife and family, but discourages policies of a purely gambling kind.

A curious wager is recorded in the Law Reports of the time of Lord Chief Justice Mansfield, the great judge who eventually succeeded in putting English mercantile law in order and reducing it to plain and simple principles. In the year 1771 a wager had been mooted (in the words of the Report) "between young Mr. Pigot and young Mr. Codrington, at Newmarket, to run their fathers, to use the phrase of that place, against each other." Eventually young Mr. Codrington backed out of the wager, but the Earl of March offered to take his place. The following notes were exchanged:—"I promise to pay to the Earl of March 500 guineas if my father dies before Sir William Codrington—(*signed*) W. PIGOT," and, "I promise to pay to Mr. Pigot 1,600 guineas in case Sir William Codrington does not survive Mr. Pigot's father—(*signed*) MARCH." At the time the bet was made, young Mr. Pigot's father was actually dead, the fact not being known to the wagerers, and, as the law then stood, young Mr. Pigot was compelled to pay the 500 guineas.

**Insurance in the Eighteenth Century.**—It was in 1774 that an Act of Parliament was passed to prevent speculative and gambling insurances. For fifty years or more before that time an enormous business had been carried on simply in betting on the lives of other people. The life of the Young Pretender was insured for tens of thousands of pounds. Premiums ruled high when it was reported that he was in danger of being captured, and were correspondingly low after news of his escape. The lives of prominent statesmen received the same amount of attention; and, in fact, the speculative insurance-broker carried on much the same kind of business as the speculative stockbroker does now. To such a length was this extraordinary kind of insurance carried, that it became a public nuisance, if not a public danger; and, after considerable discussion in Parliament, decisive action was taken. A statute was placed on the roll enacting that any insurance on life, wherein the person for whose benefit the policy was made had no interest in the life which was assured, should be absolutely null and void. The enactment has now been on the statute-book for more than a century, and has worked exceedingly well—so well, in fact, that gambling on lives has been practically suppressed. It becomes of importance to consider the question:

### Whose lives may you insure?

In the first place, anyone may insure his or her *own life*. That is the usual form of insurance. Then, anyone may insure for his own benefit *a life in which he has a monetary interest*. Let me take a common type of case: When a barrister is made a judge of the High Court, his old clerk is always appointed judge's clerk, at a salary of £400 per annum; but the appointment is at an end when the judge dies. Thus, the clerk has an interest of £400



a year in the life of his master, and he can, and generally does, insure the life of his master for, say, £1,000. So that when the judge dies and the clerk vacates his appointment, he receives the £1,000 from the insurance company by way of consoling him for the loss of his situation.

**A father cannot insure his child's life in his (the father's) name, but he can insure the child's life in the child's own name and for its benefit.** The result is that if the child dies an infant (*i.e.* under twenty-one) and unmarried, the father will take the insurance money, because he, as I have shown already (p. 69), inherits all the property of his child when the latter dies without making a will and without leaving children. As no one under the age of twenty-one can make a will, it follows that a father must inherit his son's property if the latter dies under that age, unless he has married and had children—which is not very likely.

A great outcry has been raised in recent years on the question of child life insurance, and, in fact, a Bill was introduced in Parliament by Sir Richard Webster for the purpose of stopping the practice altogether—or, at least, so far as it related to very young children. It was alleged, with some amount of truth, that children's lives are often insured by their parents with the set intention of claiming the insurance money somehow. "Get money," said the old Quaker to his son, "honestly if thou canst; but get it." It was alleged, and is still alleged, by many philanthropists, that when a child's life is insured, its parents, even though they may not attempt to hasten its death by active measures, yet do not bestow so much attention on the poor helpless bairn as they otherwise would. It is sad to think of such unnatural avarice, but Sir Richard Webster and his colleagues probably had some justification for their statements. They had not so much justification as they thought they had, however, and finally they gave up their Bill. So that a parent may even now insure his child's life if he does it *nominally* for the child's benefit. By this I mean that he must make the money payable at death, not to himself (the father), but to the child and his executors or administrators. If the child dies under twenty-one, the father, as administrator, will claim the money from the insurance office; and if the child lives to manhood the policy will be his own to do what he likes with. If a parent has a pecuniary interest in his child's life, he may insure that life for his own benefit. For instance, I knew of a man to whose young son, aged ten, a fortune was left if he attained twenty-one, and until he attained twenty-one, the sum of £350 a year was to be paid to the father for maintenance, education, and so on. There the father had a pecuniary interest in the child's life, for if the boy died under twenty-one the allowance stopped. In this case it was advised that the father could insure the boy's life in his own (the father's) name, because he had an insurable interest quite apart from any question of relationship.

**A husband cannot insure his wife's life in his own name, unless he has some pecuniary interest in her life.** There is nothing to prevent him from insuring her life in her name and making her a present of it, and then she can make a will and leave the money to him. But any such legacy by her would be entirely of her own free will, because she is not bound to leave her husband a farthing.

IN SCOTLAND the husband would come in for his share of the money just as of all the rest of her property—the which will be found fully set out in the chapter on Husband and Wife (Chap. I.).

**A wife can insure her husband's life in her own name.** This is the only exception to the general rule that I have stated—namely, that the only persons who can insure a man's life are the man himself, and anyone to whose pecuniary interest it is that the man should continue to live. To these, then, we must add his wife.

**A creditor can always insure the life of his debtor,** because he has an "insurable interest" in that life. If you are **one of two sureties** (*i.e.*, have become bound for a man), you can insure the life of your co-surety, because here, again, it is to your interest that he shall live, for if he dies there is a greater chance of your having to pay the whole of the debt you have jointly guaranteed. A clerk or servant who is engaged in the ordinary way, on a yearly engagement, cannot insure the master's life, because though the master might continue the employment so long as he lived, he is not in any way bound to do so. On the other hand, if the engagement is for the life of the master, there is a distinct insurable interest, as in the case of the judge's clerk who goes out of office when the judge dies.

**How much may you insure a life for?** I have no doubt the question will surprise some of my readers, but they will realise the importance of it when they reflect a little. In the first place, a man may insure his own life for as much as he pleases. It is only a matter for his own conscience, his family affection, and the length of his purse. A woman also may insure her husband's life for her own benefit for whatever sum she likes. But in other cases it is not legal to insure beyond *the amount of your insurable interest*. Let me explain. I have told you that you can secure yourself against the loss of a debt by insuring the life of your debtor. You cannot insure his life for more than the amount of your debt, with a slight margin for interest if he has agreed to pay you interest. If Mr. A. B. owes you £400, you cannot insure his life for £4,000. This is another provision to prevent gambling on other people's lives. You may secure your debt, but you must not speculate. Be careful, therefore, to limit your insurance to the actual amount which the other person is worth to you. Insurance companies take precautions against mis-statement and, as a rule, are very careful not to allow you to go beyond the mark. When anyone proposes to insure another's life, they invariably ask what is the insurable interest, and they require a categorical and satisfactory answer to the question.

Another point that was doubtful for a long time was this: Suppose A has, in 1880, an insurable interest in B's life (*e.g.*, B owes A money), and A effects an insurance on the life of B. In 1885, A's interest in B's life ceases (*e.g.* B repays the money he owed). Can A continue the insurance? It was argued that he could not, because his insurable interest having ceased, it would be a mere gamble to continue the policy. On the other side it was contended that it would be very hard to compel A to drop the policy. The effect would be to cause him to lose the premiums he had paid. Eventually it was decided that he could continue to pay the premiums, and would be entitled to the insurance money on B's death.



So that the point to be considered is, whether there was an insurable interest at the time the policy was effected. If there was, subsequent events do not affect the liability of the office.

**Choosing an office.**—Far be it from me to recommend anyone to insure in this or that insurance office. Space does not permit me to give a list of the reputable and safe insurance companies carrying on business in this and other countries. I merely wish to indicate how you may find out for yourself the financial position of any office on which you may have cast your eye with a view to business. **Write and ask them for a copy of the balance-sheet.** Such a balance-sheet is almost sure to be accurate, because every company is bound by Act of Parliament to keep a separate account of a life insurance business, and once every five years (ten years in some companies) to furnish an account of such business, and of the capital, the profit and loss, dividends paid to shareholders, bonuses to policy-holders and the like.

**Profit-sharing and non-profit-sharing policies.**—As most people know, you can, in almost every office, insure your life either on the terms of sharing in the profits of the office or not. If you choose to insure without participation in profits—or *bonuses*, as they are called—you pay a smaller premium than if you elect to have bonuses. An idea used to prevail, even amongst lawyers, that policy-holders who received a share of profits were partners in the office, and, as such, liable for the debts of that office. But the idea is now proved to be erroneous. Two or three cases were fought with a view to rendering “mutual” policy-holders liable like partners, and it was only after careful consideration that the Court decided against the liability. Some companies even now advertise, “The policy-holders incur no liability as partners.” Of course they don’t. They never do; and it is nonsense for any society to pretend that this is a special advantage offered by them to their customers. It is much as if a shopkeeper advertised, “People buying goods from me incur no liability as partners.” At the same time, it is important when you insure in an office to consider whether it is a proprietary, a mixed, or a mutual society.

A **proprietary** society is one which consists of a body of shareholders who subscribe a certain amount of capital to carry on the business of insurance. They issue policies and receive premiums; but they do not give the policy-holders any share in the profits made by investing the premium funds. That is, *if you are insured for £100, on your death the company will pay £100, and no more.* All the profits go to the shareholders.

A **mixed** office is where there is a company of shareholders who carry on insurance business for their own profit. They subscribe a certain amount of capital, just as the proprietary companies do. But they agree to allow persons who insure with them bonuses, or shares in the profits of the business. You can take your choice whether you insure “with profits” or “without profits.” In the latter case your premiums will be smaller. In the former case you get more for your money.

A **mutual** office is one where there are no shareholders, but only policy-holders. By Act of Parliament, as I have stated, the promoters of the society must deposit in Chancery a guarantee fund of £20,000; but beyond this the only

funds of the society consist of the premiums paid by those who insure in it. Hence the term "mutual," because the policy-holders really insure one another and get all the profits of the business.

Now **what difference does this make to you**—I mean to the family man who wants to insure his life? There is little practical difference (except as to amount of premium) between a mixed and a proprietary society; but there is a great deal of difference between these two and a mutual society. In the case of the first two you have better security, *because you have not only the funds that have accumulated from premiums, etc., to look to, but you have also the capital fund* subscribed or promised to be subscribed by the shareholders. Mutual societies, on the other hand, have no funds except those that have accumulated from premiums and profits.

To illustrate this, take two companies, one mutual and the other not. Each of them has the same amount of business—let us say each receives in premiums about £200,000 per annum. This is invested, and the interest will amount to (say) £8,000, which is profit. Next year there is another £200,000 received in premiums, and also the interest on the funds already invested. From these sums, amounting in the two years to about £420,000, claims have to be met as policy-holders die. Now, the mutual company has only this money to fall back on to meet all claims and all expenses. Should some of the investments turn out badly, and the money be lost, the policy-holders are likely to be in a bad way. But the non-mutual company has not only the premium fund, it has also the shareholders' money, which will probably amount to at least £50,000 more. In some cases it will be as much as £200,000. My opinion, therefore, is that it is safer to insure in a non-mutual society. But you get *more for your money* in a "mutual," and provided it is well established, with a substantial accumulated guarantee fund, there is only the *very smallest* risk of loss. Therefore, if you decide to go in for bigger returns, and insure in a mutual society, keep your eye on the guarantee fund. If that fund be large, you are safe enough for all practical purposes.

I hope these few observations on the different kinds of companies may be of use to the family man who wishes to insure. Remember—always look to see whether the company is "mutual" or not. Mutual means slightly higher profits; non-mutual means slightly better security. Secondly, always ask to be supplied with the "Accounts and Statements deposited with the Board of Trade, pursuant to the Life Assurance Companies Act, 1870," and **particularly observe the amount of the guarantee fund, if the society was formed after the year 1870.** Life insurance companies carrying on business in the United Kingdom must furnish reports to the Board of Trade, showing all income, outgoings, business done, and so forth—in fact, a fairly complete account of themselves and their business. You may see these reports by applying to Messrs. Eyre and Spottiswoode, London, the Queen's printers, who will forward you the Blue-book containing the whole of them for any year, at the published price. This rule only applies to English and Scottish companies.

But there is another rule applicable both to home and foreign companies carrying on business in the United Kingdom. Every life assurance company beginning



business in the United Kingdom *after August 9th, 1870*, must deposit £20,000 in the Chancery Division of the High Court, to be invested in approved securities. All life assurance business must be kept separate from any other business, and the money received from it is to be considered a guarantee fund for the security of the life-policy holders. It can only be made liable for the debts incurred by that department. For instance, if a company carries on both life and fire insurance business, a claim for heavy loss by fire cannot be paid out of the funds directed by the Legislature to be used to satisfy the life-policy claims. I may also add that after you have insured in an office, you are absolutely *entitled*, on demand, to see a copy of the last annual balance-sheet.

**How to insure** is the question next confronting us. There are two principal things to be considered. The first is the proposal, the second the contract.

**The Proposal**, as I have stated on a previous page, invariably consists of a string of questions printed on a form, which questions the insurer answers to the best of his knowledge. In addition, the "life" is required to be medically examined, and to answer certain questions chiefly relating to his state of health and constitution and to such other facts as are likely to affect the insurableness of the life. Now these questions and answers are most important. In fact, they ought to be your paramount consideration. The following is a sample of the questions put by the great life assurance offices:—

(1) State your Name, Residence, and Occupation.

(2) Sum to be Assured.

(3) Place and Date of Birth.

(4) Age next Birthday.

(5) Has your Life ever been previously proposed for Assurance?

If so, name the office or offices? and when, and with what result in each case?

Has a proposal for an Assurance upon your Life ever been accepted at an ordinary or extra premium, declined, postponed, or withdrawn?

(6) Have you ever been medically examined with a view to Life Assurance? If so, give particulars.

(7) What is your present state of health?

(8) Name and Address of usual Medical Attendant.

(9) Have you had any illness within the last five years? If so, what was the nature of such illness, and what medical man attended you on the occasion?

(10) When had you last occasion for medical attendance, and for what cause?

(11) Have you had small-pox, or been successfully vaccinated?

(12) Have you ever had any of the following diseases:—

(a) Spitting of blood, habitual cough, asthma, or any disease of the lungs or chest?

(b) Attacks of palpitation of the heart, with difficulty of breathing, or faintness?

(c) Jaundice, tumour, ulcer, or abscess?

(d) Any accidental injury, or surgical operation?

(e) A fit of any kind, or form of paralysis?

- (f) Attacks of giddiness, or loss of consciousness ; or bad digestion ?  
 (g) Rheumatism, gout, or other constitutional disorder ?  
 (h) Any disease of the kidney or bladder, or dropsy of any kind, or fistula ?  
 (i) Any disease of, or discharge from, either ear ?  
 If so, how often, and what was the nature and duration of each attack ?  
 Were you medically attended ; if so, by whom ?
- (13) Have you at any time been ruptured ?
- (14) Have you had medical attendance for any (and if so, what) affections not mentioned above, except children's illnesses ?
- (15) Are you now, and have you always been, of sober and temperate habits ?
- (16) Have any of your relations, living or dead, been affected with asthma, consumption, mental derangement of any kind, fits, or cancer ?
- (17) Are you married or single ?
- (18) Give the names and occupations of two intimate friends (not near relations, nor interested in the assurance) to be referred to as to the state of your health and your habits of life.
- (19) Have you ever resided out of Europe ? If so, where, and how long, and did your health suffer ? Have you any intention or prospect of going beyond the limits of Europe ? If so, state fully what such prospects or intentions are.
- (20) Are you aware of having any predisposition to any complaint ?
- (21) Give particulars of your family history in the following form :—

IF LIVING—STATE OF HEALTH.			IF DEAD—CAUSE OF DEATH.		
	AGE.		AGE AT DEATH.		YEAR.
Father ...					
Mother ...					
Brothers ...					
Sisters ...					

It is of the utmost importance to **give absolutely truthful answers** to all these interrogatories. If you answer a single one of them inaccurately, the policy is not worth the paper it is written upon, because the answers, which constitute the proposal, form the foundation of the insurance. It will not be sufficient for you to answer the question as to the letter and not as to the spirit. You must consider each question, and ask yourself, "What does the company want to know ?" Having made up your mind as to the information they desire, proceed to answer as frankly and fully as possible. Remember this : **the slightest concealment of a material fact absolutely vitiates the whole policy.** In the case of most contracts you are required, if you speak at all, to speak the truth, and nothing but the truth ; but there is no compulsion to speak the whole truth unless you are specially asked. *But it is different with*



*a contract of insurance.* You must speak the truth, the whole truth, and nothing but the truth, as solemnly as if you were on your oath.

**What is an untrue answer sufficient to make the policy worthless?** In the first place and in answer to the first question, you must state your residence and occupation without concealment or disguise. Why? Because evidently a man who lives all or a part of his time on the Gold Coast of Africa is not likely to live so long as one who resides, say, at Malvern, where, according to the local legend, people who want to die are obliged to leave the parish. There are some persons who, either from choice or necessity, reside in more places than one. No man can live in two places at the same time—unless, as Sir Boyle Roche said, he is a bird. But a man can, and frequently does, have two places of residence at the same time. For instance, a man is in the employment of a firm of merchants who deal in African produce. He is sent from time to time from England to some part of the Dark Continent, where he makes his home for six or twelve months. Then he returns to the old country and lives there for six or twelve months, and so on alternately. In the ordinary way, if that man were asked to describe his residence it would be enough for him to give his British address; but it would not be good enough for a life insurance proposal. I do not think I need give the reasons in detail, because it must be obvious that the *risk of death* is far greater in the case of a person such as I have described than in the case of an ordinary stay-at-home Briton.

The occupation must also be stated with some degree of *minuteness*. For instance, one who is a foreman engineer at a cutlery place where steel is ground must say so explicitly. He must not simply describe himself as foreman engineer, because those employed in the grinding trade are specially liable to disease of the lungs caused by breathing the small particles of steel which float about grinding works.

The **age** is another important matter. The best plan is to write to the Registrar of Births at Somerset House, sending him half-a-crown, and he will send you your certificate. If you produce this document at the time you are insured, it may save your relations trouble when they claim the money, for the office may ask them to prove your age.

You must also be very careful to give a full answer to the question (5) which relates to **previous proposals for insurance in other offices**. An illustration will make this plain to the reader. A certain Mr. Blank tried to insure his life in the X. Y. Z. Assurance Office. One of the questions put to him was: "Has a proposal ever been made on your life at any other office or offices, and if so, where? Was it accepted at the ordinary premium, or at an increased premium, or declined?" Practically the same question as (5) above. To it Mr. Blank made answer: "Insured now in two offices for £16,000 at ordinary rates; policies effected last year."

Now this answer was true, after a fashion. That is to say, there was nothing untrue in it. At the same time, it was distinctly misleading, because Mr. Blank had been proposed to five other offices and respectfully but firmly declined. The X. Y. Z. Office accepted the proposal, and received the first premium. Then they heard of the five rebuffs that Mr. Blank had experienced, and at once offered to

cancel the agreement to insure, and return the premium. But Mr. Blank declined. He said: "I told you nothing but the truth. I was insured in two offices, as I stated, and what did it matter how many times I had been declined if I had been twice accepted at ordinary rates?" When the insurance company brought an action to set aside the agreement, Mr. Blank's counsel used similar arguments; but Sir George Jessel, who tried the case, did not look at it in that light. He said in effect: "You ought to have made a clean breast of it. The five companies who declined to insure you may have been wrong. Their reasons may have been weak or even foolish, but at least you ought to have given the X. Y. Z. Office a chance of forming their own opinion. Clearly you have not disclosed all the material facts which you ought to have disclosed, and whether you concealed the facts innocently or not does not matter. What does matter is that your answer was likely to mislead—and it did mislead. Therefore the agreement must be cancelled." This case shows the importance of stating not only the truth and nothing but the truth, but also the whole truth.

In another case Sir George Jessel, than whom there never was a greater authority, said, "If a man purposely avoids answering a question, and thereby does not state a fact which it is his duty to communicate, that is concealment. Concealment, properly so called, means *non-disclosure of a fact which it is a man's duty to disclose*; and it was his duty to disclose the fact, if it was a *material* fact."

Another very apt illustration is the case told by Baron Alderson of the man who tells a lie by speaking the truth. In other words, he tells the exact truth, intending the other party should not believe it. An eminent ambassador, Sir Henry Wotton, was asked what advice he could give to a young diplomatist going to a foreign Court. He replied, "I have found it best always to tell the truth, as they never believe what an ambassador says; so you are sure to take them in."

The question numbered (7), "**What is your present state of health?**" also requires a careful and *detailed* reply. The most remarkable case I ever heard of in this connection was that of a man who had constant spitting of blood, a hacking cough, and pains in the chest. This gentleman told the insurance office that he enjoyed good general health! Needless to say his policy did not hold good. But there are cases which show what the answer to this question ought to be. There is the case of Sir James Ross, who said that he was in good health. Now he had received a wound in the loins at the battle of La Feldt, so that he had a kind of relaxation and could not retain his excrement or urine. This fact he did not disclose; but it was held that the policy was good, because, notwithstanding this, Sir James believed himself to be, and was, of **reasonably good health**. In fact, he died of a fever which was in no way connected with the wound.

I heard a case argued before three judges in the Court of Appeal not long ago, in which an insurance office resisted a claim on the ground that a man had stated that his state of health was good, whereas in truth and fact it was not good. The Q.C. who represented the office alleged that the man was, at the very time he made the averment of good health, suffering from a cough, and that he was subject to coughs. Therefore, said he, the man was unhealthy, or diseased. Disease, said the Q.C., is an abnormal (*i.e.* unusual) condition of the body or of *any part* of it, and if a man is diseased he ought not to say that he is in good



health. "If I have a corn on my little toe," said one of the judges, "would you say that for that reason I am not in good health?" "Certainly not," the lawyer replied. "Why not?" said his lordship. "Surely my toe is part of my body, and a corn on the toe is an abnormal condition of that part." This *reductio ad absurdum* was too much for the learned counsel. It is absurd to say that one is not in good health because he sometimes has a cold or cough. Many people in England have an annual bout of it when the March winds do blow, but they may be and probably are people of reasonably good health for all that, and they would be justified in saying so to an insurance company.

A great judge once remarked, in a case of this kind, "No one can guarantee that he has not the seeds of disorder. We are all born with the seeds of mortality in us. A man subject to the gout is a life capable of being insured, **if he has no sickness at the time to make it an unequal contract.**" Therefore, in answer to the question about general health, all that is necessary is for the person under examination to give his own honest opinion, not concealing anything which is of a permanent and lasting nature.

It would seem almost impossible for any doubt to arise about the next question (8), as to **your usual medical attendant**, but, in fact, questions have occurred as to the correctness of the answers given. It is most important to give the proper answer, as the insurance office is entitled to have the opportunity of consulting with the medical man who knows your constitution. There is a good case in point, where a lady who insured her life gave an answer quite in good faith, but still wrong and misleading. Before her marriage she had been attended for a considerable time by a Mr. Duck, surgeon, of Bristol. After her marriage this gentleman ceased to attend her, and, in fact, she had no occasion for a doctor. There was, however, a Mr. Day, who was her husband's medical man, and who attended the family. On one or two occasions, when called in to attend the husband, Mr. Day incidentally gave a little advice to the lady. When the latter proposed to the insurance office to insure her, she stated that Mr. Day was her "usual medical attendant," and on the office applying to him for information, he said that, as far as he knew, the lady was in good health, and that he had never professionally attended her at all. Now the insurer ought to have said that her usual medical attendant was Mr. Duck, because the question was evidently meant to find out *what medical man was acquainted with her constitution*. This is the point you must bear in mind when you insure your life.

Another point is, that even a *quack* doctor may be your usual medical attendant. There was a man named House, who, in answer to the usual question, said, "I have never had occasion for a doctor; but Mr. X knows as much of me as any man." The truth was that Mr. X had visited him about twenty years before; but he had been occasionally attended by a quack named Harvey, who treated him for the after-effects of drunken sprees, in which Mr. House sometimes indulged. The judges decided that Harvey was the "usual medical attendant." It made no difference that he was not a good one. He was, in fact, the man called in, and his name ought to have been given.

But perhaps the most important questions, requiring the most careful answers, are numbers (12), (15) and (16), in which you are asked about **various particular**

diseases, sobriety, and the presence of disease in the family. The questions are pretty searching. Take the one about spitting of blood, for instance. As a learned judge once said, "You cannot have a tooth drawn without spitting some blood," and of course that sort of spitting of blood is not meant to be included in your answer. What you ought to put down is any spitting of blood from the throat, or chest, or stomach; for such spitting is very possibly the result of disease. It is not always so, for there are numbers of people who have spit blood once and no more. If you happen to be one of those, you ought to reply this way: "I spat blood once about three years ago. I do not know the cause [or, the spitting was caused by —]. Dr. Lancet was called in and attended me for a few days. He said it was nothing serious, and I have never had another attack."

Then take the one about "*loss of consciousness*." A great many people, I suppose, have lost consciousness once in their lives. I know I did once when I was a boy at school. It occurred in this way: I had been in bed with mumps for about ten days, fed on slops of various kinds, and on the eleventh day there was an important football match being played by us against a rival school. I foolishly stole out of bed, dressed for the fray, and took part in the match—what time another boy undressed and took my place in bed, with strict injunctions to be asleep with his face to the wall if anyone came into the room. After playing for half an hour I fell down in a dead faint, as I might have expected. But when I insured my life I did not think it necessary to mention this. What the insurance office wants to know is, "Are you subject to attacks of loss of consciousness?" and as that was my first and only time, I said "No." But if I had ever had giddy fits, or been in the habit of fainting, I ought to have said "Yes."

Now let us consider what are *sober and temperate habits* sufficient to entitle you to answer the fifteenth question in the affirmative. Here, again, it is the word "habits" which forms the point of the inquiry. There was a very good instance given in a case tried in the Scottish Courts of a man who regularly got drunk, and was yet a man of temperate and sober habits. This gentleman had told an insurance office that he was temperate and sober, and when he died they refused to pay, on the ground that his representation on this point was untrue. It turned out that the worthy man was a town councillor, and once a year the members of that body had a little dinner, and then made a night of it. On these festive occasions the councillor invariably came away with more than "just a drappie in his ee." He was, in fact, as they say north of the Border, "fou," very "fou" indeed. He was in the condition of the man who was told by his host that he would find "two cabs at the door," "and," he added, "take the first one, for the other one's not there." But, although he saw things in duplicate once a year, the town councillor was a douce, decent body until the next feast came round. When, therefore, the insurance office brought the annual junketing up by way of showing that he was not of sober and temperate habits, they were fairly laughed out of court. And very properly, too, for how can you say with fairness that a man who exceeds one day in the year and keeps sober the other three hundred and sixty-four is a drunkard, or even an intemperate man? The intemperate man is one who habitually



exceeds the bounds of moderation; so that if you do not habitually go home "fou," you are justified in writing yourself down as a sober man.

Let me now repeat what I have said before. It is of the utmost importance that you should disclose everything which is likely to affect the risk of the insurance office fully and frankly. If you do not, the policy will be worthless, and so far does this doctrine extend that even if the ultimate cause of death has nothing whatever to do with the thing you concealed, the policy is still null and void. For instance, you are asked whether you have ever had palpitation of the heart, and you say "No," whereas, in fact, you are subject to that complaint. Some years afterwards you die of small-pox, which has nothing whatever to do with the heart affection. Nevertheless, the insurance office will be entitled to refuse to pay the claim. The reason is, that the contract of life assurance being one *uberrimæ fidei*, of the utmost good faith, any one single misrepresentation or material concealment makes the policy bad from the very beginning. I do not say that the insurance people will refuse to pay. In my own experience, the good offices never have refused in the circumstances, but if they do pay, it is quite a voluntary charity on their part, because they are not legally liable. And, moreover, some offices have stricter rules than others, and will refuse to meet the claim.

I will suppose that you have answered the questions put to you satisfactorily. The next step is the issue of the policy. Many men, when they receive one of these documents, do not look at it, but put it away in a drawer, or desk, or safe, where it remains until their death. I need hardly point out that this is not a very business-like proceeding, because the terms of the policy are binding upon you, and there may be some terms of which you do not suspect the existence. The following are some of the conditions which are to be found in policies of life assurance. You will not find all of them in every policy, and, indeed, the policies of some offices have hardly any conditions attached to them. Competition in the business is so keen nowadays that most companies now insert as few restrictive terms as possible. They try instead to secure themselves by insuring only "good lives."

But as some companies insist on some of these conditions in their policies, I will mention and explain the most numerous and most important of them. The first is that the premium must be paid every year on the anniversary of the first payment, or within thirty days afterwards. These thirty days are called "days of grace." This condition forms part of every policy, and it is essential that it should be observed to the very letter. Forgetfulness is the commonest of human failings, and it is astonishing how many people forget to pay their insurance premium at the proper time. It is customary for a company to send notice when your premium falls due, but they are in no way bound to do so; and if from any cause whatever you fail to pay within the days of grace, the company is not bound in any way to accept your money if you tender it later. An action was once fought on this point. A man had, through absence from England, failed to pay his premium at the proper time. Two or three days after the days of grace had run out he appeared at the company's office with the money, apologised for being late, and offered to pay

it. The clerk refused to take it, and on the directors being communicated with, they endorsed their servant's action. The customer was incensed and went to law about it. His argument was : "You suffered no damage through my being late. What difference could it make to you if I offered to pay on the 3rd instead of the 1st, provided that I had not been ill in the meantime?" But he lost his case. The judge held that *the policy came to an end at the end of the year, unless the premium was paid within the stipulated time.*

There are some companies that are willing to listen to an application for more time in which to pay, but you have no legal right to demand such time, and should never rely on an application being granted. The practical moral of this is, to look at the policy as soon as you get it, and carefully bear in mind the day on which your premium is due.

A second condition is, that **the statements made in the proposal form the basis of the policy.** This condition is not inserted by all insurance companies, and when it is inserted it is of no value whatever. The law of the land is that those statements shall form the basis of the insurance, and it is perfectly idle to reiterate the law. I will not, therefore, waste your time in discussing this condition.

A third condition relates to **travelling by sea.** Some few offices say in effect : "The policy shall be void if the assured shall go upon the sea without leave of the directors ; except from one port of the United Kingdom to another, or direct from one port of Europe to another in time of peace." If your policy contains such a restriction you must be careful to obtain leave of the directors if you want to sail anywhere except direct to a European port. You must also ask leave if you want to go for a cruise in an indefinite sort of way. Thus, if you are asked to take a cruise in a yacht—not to anywhere in particular—the restriction forbids you to do it without leave.

Another form of the restriction is : "If the assured shall *die* while on the high seas, except going direct from one port of the United Kingdom to another, or to a port in Europe in time of peace, unless he has leave of the directors." Here the condition is not so stringent ; but you will be wise to ask for leave just as in the other case, for if you should go, say, to America, and die on the way, the office will not pay the claim unless they have given you leave to go.

A third form of the same restriction is confined to death by *drowning* at sea, unless you have obtained leave from the office to make the voyage.

A fourth condition forbids the assured **to travel either by land or sea** beyond the limits of Europe, unless by permission from the office.

The modern tendency is to do away with these restrictions on travel, and I advise you, before you entertain the idea of insurance at any office, to ask if you are allowed to travel without restriction. There are so many good offices nowadays which do not impose any such condition that there is no need to apply to one that insists on the restriction.

A fifth condition, quite usual and proper, is that if the assured shall, without the consent of the directors for the time being, **engage in a seafaring occupation, or in naval or military service,** the policy shall be cancelled. You can easily see why such a condition should be imposed. There is obviously a greater



risk in insuring the life of a naval seaman, who may be sent to Africa to fight slavers, than in insuring a man of peaceful calling—as, for instance, a barrister, who runs no risk of being slain unless he loses a perfectly hopeless case for a lady client.

A sixth condition is: “If he shall commit **suicide**, or *die by the hand of justice*, or by *duelling*,” the policy shall be null and void. Other offices say, “if he shall die by suicide, sane or insane, or by the hands of justice, or by duelling.” A word or two about insurance and suicide. Suicide is a crime, and in the eye of the law is as guilty as murder; and, because no one is allowed to reap an advantage by his own crime, when a man commits suicide he forfeits his life policy. And he forfeits it whether there is a condition in the policy or not. Indeed, if you had a policy with a condition which expressly stated that suicide should make no difference, it would not be any good to you. The reason must be obvious. So long as suicide is unlawful, a man must not be allowed to make a contract that might encourage it. And it would be an encouragement to suicide if the man knew that by a dose of poison he could make provision for his wife and little ones. Therefore, no insurance office is ever bound to pay the policy-money of a suicide.

But it is a well-known principle of law that to constitute a criminal you must first of all have a sane man. No one can possibly be a criminal if he is not sane, and I daresay you have all read of cases where men who have committed murder have been found not guilty because they were of unsound mind. It is the same with every other offence, including suicide. Now, it makes all the difference in the world when a coroner's jury find a verdict of suicide, if they add, “while of unsound mind.” If the unfortunate man was insured, “suicide,” plain and simple, means that his family have no right to claim the policy money; but “suicide while of unsound mind” alters the case entirely. The insurance office must pay—**unless** they have inserted the condition “**sane or insane.**” If such a condition has been put in, the sanity or otherwise of the suicide does not make any difference, because they have expressly guarded themselves against all possible suicides.

The reason why (unless there is an express condition of “sane or insane”) the policy is not made void by a suicide while insane was expressed with great force by Lord Chief Baron Pollock in these words: “If the insanity should produce delusion and deprive a man of the use of the ordinary senses, and the party should mistake a deadly weapon for an instrument of music, and fancy he was playing upon it when he was destroying his own life, this would not be committing suicide. But what if the delusion, instead of applying to a pistol or other instrument of death, applied to the man himself? Suppose he believed that he was Marcus Curtius, and ought to leap into a gulf? or that he was one of the Decii, and must sacrifice himself for the benefit of his country? What if he fancied himself an Apostle, and that it was his duty to die the death of a martyr? What sound philosophy is there in taking a distinction between a delusion about a pistol and a delusion in respect of the man against whom it is to be directed? or what distinction, in point of good sense, can be taken between physical blindness, in consequence of which the party insured walks into a well, and intellectual or moral blindness, which, leaving him the use of his senses and a knowledge of the physical consequences of his acts, has deprived him of all judgment which should control and govern them, and of all sense to perceive their moral consequences?”

So much for suicide, which is properly self-murder. Now let us come to another kind of case, not very usual, I am glad to say. The class is well illustrated by the case of Mrs. Maybrick, a woman accused a few years ago of murdering her husband by poison. The husband had insured his life in his wife's name and for her benefit for a considerable sum, and when she found herself accused of causing his death she made over the policy to her solicitor, so that he could raise money for her defence. The wife was found guilty after a protracted trial, notwithstanding a most eloquent defence by her counsel. She was condemned to die, but was ultimately reprieved and the sentence commuted to imprisonment for life. Then the solicitor went to the insurance company and claimed the husband's insurance money. Mr. Maybrick had fulfilled all the conditions of the policy; he had paid premiums regularly; nor had he died by the hand of justice or his own hand. But the insurance company would not pay, and the judges held that they were right in refusing. The ground of the decision was that it was *against public policy* to allow a person to gain money by committing murder. This is reasonable enough. In days when medical, or rather chemical science was not in such a good state as it is now, there was a good deal of poisoning people for the sake of their money. Our criminal annals abound in such cases, and it is safe to assume that in the old days, when the presence of poison in the body could not be so readily detected, owing to the imperfect knowledge of medical men, for every case found out there were two or three undiscovered. The science of analytical chemistry has made such wonderful strides during the past thirty or forty years, and the experiments in toxicology have been so much more numerous, that poisoning can rarely be carried on successfully. In fact, it is now a very unusual form of crime. But at the same time the judges have laid it down in unmistakable terms that no murderer shall profit by his crime; and it is well to know that a suspicion once aroused in the mind of an insurance manager is a ghost very difficult to lay.

A person whose life is insured and who **dies by the hand of justice** has forfeited his policy. The principle is the same here as in the case of suicide—namely, that no one shall take advantage of his own crime. There are only three cases in which a man can die by the hand of justice in Great Britain: (1) for murder; (2) for high treason; and (3) setting on fire a ship in the London Docks. And if a man, after insuring his life, should be convicted of one of these crimes, his family will in no case have a claim against the insurance office. Many companies do not put this condition in their policies, and they are wise. The result is the same, and to put into a policy what the law itself enforces in any case is only a waste of printer's ink.

**Indisputable policies.**—I should like to say a word on this subject. The prospectuses of some societies contain words to this effect: "All our policies are indisputable." Now, it is a principle that just as the insured is bound by the statements he made in the proposal, so the office is bound by the statements made in its prospectus and other advertisements. These were made to induce and do induce you to deal with the office, just as those were made by you to induce and did induce the office to deal with you.

I find it not easy to say what an "indisputable" policy is in law. This I do



know—that no agreement of any kind can make a policy indisputable in fact. For instance, if the “life” dies by suicide [unless insane], or at the hands of the hangman, the insurance company is never bound to pay. So that all policies are disputable so far.

On the other hand, a policy described by the company as indisputable has some advantages. There was once a curious case about this matter. A company was formed called The Indisputable Life Assurance Society, and this company advertised far and wide that all its policies were indisputable. The same announcement was stamped upon all its policies. But *as soon as ever a claim was made* upon the company it refused to pay, and so the Indisputable went into Court to dispute payment of its very first insurance debt. The ground of defence was that the plaintiff, who had insured another person’s life, had no insurable interest—a term I have explained on a previous page. The judges decided against the company, so it had to pay forthwith. The action had even worse consequences for it, for no one would look at its policies after that, and it was wound up.

What is generally understood by insurance lawyers to be the meaning of the words “our policies are indisputable,” is, that the company is bound to pay the claim even though some of the statements made by the “life” were not true—if they were not fraudulent. As I have told you before, if, when you make your proposal, you give an untrue answer to one of the usual questions, your insurance is valueless. But an “indisputable” policy would be good, unless the company is prepared to show that your answer was deliberately untrue, and made with intent to defraud them. There is all the difference in the world between the two cases. The one is an untrue statement, and the other is a lie. The one is made innocently—perhaps by mistake, or perhaps through pure ignorance. The other is deliberately and consciously false. Thus, I may be asked, “Have you any chronic disease?” And I say “No.” As a matter of fact, I *have* pains in the head sometimes, which ought to tell me, if I were a scientific man, that I have some disease of the brain. But I do not know this. I imagine the pains to be merely temporary and of no importance, and so I do not mention them. Here we see the difference between an ordinary policy and an indisputable one. In case of the former, the office would be entitled to refuse to pay the claim; but in the latter case they would be bound to meet it, because, although I said what was false, I thought I was speaking the truth.

#### WORKING MEN’S LIFE INSURANCE.

There are life insurance societies which especially cater for working men. The feature of these societies is that the premiums, instead of being paid yearly, are payable weekly or monthly. Another feature of them is that collectors come round to gather in the premiums week by week. I want to give a few words of caution to people who insure in these societies, but I am anxious to say that anything herein written must not be construed into an attack on these institutions. The most important caution is this: Be careful not to insure for too much. By “too much” I mean a sum for which you have to pay a premium so high that you may

find a difficulty in keeping it up. The danger is that if trade should fall and wages fall with it, some day you may find yourself unable to pay the full amount agreed to be paid, and then the policy will lapse, because the society is not bound to accept a smaller amount and insure you for a sum smaller in proportion.

I am sorry to say that it *occasionally* happens that these working men's insurance companies are disposed to stand on their strict legal rights. This is the kind of thing I mean: Smith, whose wages are thirty shillings a week, insures in the Blank Insurance Society at the weekly premium of one shilling. After paying for several years, Smith is thrown out of work and cannot pick up another job for many weeks. During that time his little savings are exhausted, and at last there comes a day when the weekly insurance shilling is wanted to fill the mouths of the wife and little ones. The collector calls as usual, but for once receives the answer, "Not to-day." By the rules of many of these societies, the insurance policy lapses at once and becomes quite useless. Moreover, all the shillings paid so punctually in the past are forfeited.

I do not want to recite grievances merely. I wish rather to suggest remedies for them, and I would advise any workman who has insured his life in this way and finds himself in danger of losing all the benefit of his thrift by a little temporary distress, not to wait until the collector calls for the next instalment, but to go as soon as possible to the principal agent in the district, or to write to the head office. He should ask the agent or the head office for an extension of time in which to pay his next few premiums. A really respectable office will hardly ever refuse such an application, though I am bound to say that they are not obliged to comply with it. At the same time, no society with any regard for its good name will refuse a temporary grace of this kind.

But what I wish to impress upon you is this: *Do not*, upon any account, leave the matter until the collector calls, and then try to prevail on *him* to grant you time to pay. As a rule, he will not—for the very good reason that he has no power or authority to grant favours of the kind. His duty is simply to receive proposals for insurance and transmit them to the head office, to collect the premiums when they are due, and to give receipts. So that, however much he may feel for you, he cannot give you any time to pay. And if you do not pay on the proper day, your insurance has gone, and your past payments are lost to you.

Suppose that you make an application for an extension of time in which to pay one or more instalments, and the company refuses to accede to your request, what are you to do then? The only thing that I can advise is that you shall *borrow the money on the security of the policy*. By this I mean that you shall agree with somebody for him to go on paying the premiums until you are able to continue the payments. You agree to repay the loan with, say, five or six per cent. interest, and in the meantime the lender shall hold the policy as security. The result of this will be that if you die without repaying the sums paid on your behalf, the lender will be able to repay himself out of the amount due from the insurance society; and the balance of the policy money will be saved for your wife and family. An agreement by one person to pay another's life insurance premiums would run in this form:—



**Agreement** made the [20th] day of [June, 1897] between Alfred Asker, of 10, High Street, Clogton, and Benjamin Basker, of 12, South Road, Clogton, as follows :—

1. Alfred Asker agrees to pay up to and including [six months] from this date the premiums which may become due upon the Policy of Life Assurance number effected upon the life of Benjamin Basker in the [Star-Blank-Asterisk] Assurance Office. Such premiums amount to [sixpence] per week ; and are payable on every Monday.

2. Benjamin Basker agrees to repay all monies so expended by Alfred Asker, with [5] per cent. interest.

3. Alfred Asker shall have a charge upon the said Life Assurance Policy for all monies so expended and the agreed interest.

*Witness :* CHARLES CASKER.

(Signed) ALFRED ASKER.

BENJAMIN BASKER.

Then let the lender give notice to the insurance office, sending them a copy of the agreement.

## Book II.

### THE LAW OF THE HOUSEHOLDER.

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#### CHAPTER I.

##### THE HOUSEHOLDER AND HIS LANDLORD.

The form of a lease—When in writing and when not—Signing—Tenant in possession under an invalid contract—Weekly tenants—Monthly tenants—Yearly tenants—Paying rent quarterly or half-yearly—Notice to quit—A few hints—"Give and take a quarter's notice" is not a quarterly tenancy—Remaining after notice to quit—A popular fallacy—The rent—Usual quarter-days—No deductions from rent—Must the landlord call for the rent?—Paying through the post—Distress for rent—Why?—When?—What?—How much does it cost?—Illegal distress—Repairs—Whose duty is it to repair?—Covenants to repair—Interpretation of various clauses in leases—What are repairs?—Duty not to destroy the property—Forfeiture of a lease—How the tenant is protected—Notice to the landlord to repair—Rates and taxes—What are tenant's, and what are landlord's rates and taxes—Agreements to pay rates and taxes—Workmen's dwellings—Insurance—Assigning and sub-letting: the proper form of agreement—Covenant not to carry on trade or business on the premises—What are trades and businesses—A frequent grievance—Covenant to reside on the premises—Tenant's right of way—To church and market—Tenant's fixtures—A thing worth knowing—Scots law—Form of binding lease—Stamp duty—Notice to quit—The rent—Landlord's security for rent—Repairing the house—Compensation for improvements—How you may use the house—Fixtures—Flats in England—Tenement houses.

In considering the subject of the Householder and his Landlord, the first thing to do is to talk about **the agreement of tenancy, or lease**; and the division of this branch of the subject plainly is into **the form of a lease, and the contents of a lease**. Now, first as to the form, or

##### HOW AN AGREEMENT OF TENANCY OUGHT TO BE MADE IN ENGLAND.

It is a historical fact that in England, as in every other country, agreements and bargains of all kinds were at one time made simply by word of mouth. It could not be otherwise, because people could not write. Now this method of conducting business, though the only one possible at the time, was highly unsatisfactory in many respects. Especially was it unsatisfactory when disputes arose about the terms of the contract, more particularly when those disputes began a long time after the agreement was made. The memory of man is very fallible, and I have met few people, however honest, whom I would trust to recollect precisely the details of a transaction which occurred two years ago. This difficulty



of obtaining evidence absolutely trustworthy was felt in England for a long time, and in the reign of Charles II. an attempt was made to remedy the defect in some measure. One of the provisions of the celebrated Statute of Frauds passed in that reign, was this : Every lease or agreement of tenancy for *more than three years* from the making must be *in writing and signed*. These are not the precise words of the section, but they give the effect of it with sufficient accuracy. Subsequent legislation, in the reign of Queen Victoria, said that all leases of *over three years* must be by a *deed*.

Now, a deed differs from a writing in this : A **deed** is a formal document, signed and sealed by the people making it, and delivered by the one to the other. Thus you will invariably see at the end of a deed these words : "Signed, sealed, and delivered by A B in the presence of C D" (a witness), and there ought always to be a piece of sealing-wax or a wafer on the paper, which wax or wafer the parties should touch in token of sealing the deed. Deeds are generally used for transactions of considerable importance, where it is desired to have the best evidence possible of what has been done.

The legislative acts to which I have called your attention leave the law in this state :—

- (a) A lease or agreement for *three years or less* may be by mere *verbal* arrangement.
- (b) A lease for *over three years* must be by a *deed*.
- (c) An *agreement* of tenancy for over three years must be *in writing*.

It is always best, even in an agreement of tenancy for a short time, to put down the terms in black and white, and have them signed by the householder and by the landlord. The reason is obvious. A dispute might arise at any time ; the recollection of the landlord might not agree with yours, and there would be some unpleasantness, if not a law suit.

I said that an agreement for over three years must be in writing. This means, of course, that the *whole* of the terms must be in writing, because if you miss out something, you clearly have not got a written lease, but a lease partly written and partly verbal. And as the statute requires you to have the lease in writing, and you have clearly not complied with the law, you have no lease at all, any more than if you had it all by word of mouth. People will persist in making agreements like this : "Mr. Jones agrees to let, and Mr. Smith agrees to take, the house, 20, High Street, Bluetown, for five years, on the terms arranged to-day." When they begin to resort to pen and ink, I am at a loss to conceive why on earth they cannot set down what the "terms arranged to-day" are. You may take it as clear law that no verbal or partly verbal lease is of any use, unless it is for three years or less.

Now, what are the terms required to be set down in a lease ? The *first* is the names of the landlord and the tenant ; the *second* is the description of the house ; the *third* is the length of the term ; the *fourth*, the rent ; the *fifth*, agreements as to rates, repairs, and such like. The first four are absolutely necessary to *every* tenancy. Sometimes no arrangements are made about rates, repairs, and the like, but if arrangements *are* made, they must be put down, and not left to that curse of business life, "an honourable understanding." Honourable understandings

FORM OF AGREEMENT FOR TENANCY OF DWELLING-HOUSE FROM  
YEAR TO YEAR.



**This Agreement** made the fifth day of May One thousand eight hundred and ninety eight Between **Albert Ross** of 12 Haystock Road Birmingham in the County of Warwick Surveyor (hereinafter called the Landlord) of the one part and **Augusta Maria Stobbs** of 8 Sutherland Avenue Birmingham aforesaid Spinster (hereinafter called 'the Tenant') Whereby it is agreed as follows:

- 1 The Landlord hereby lets to the Tenant and the Tenant hereby accepts **his** tenement known as and situate at N<sup>o</sup> 18 Hampstead Heath Road Handsworth in the County of Stafford with the fixtures and appurtenances for the term of One year from the twenty fourth day of June next and so on from year to year determinable on the twenty fourth day of June One thousand eight hundred and ninety nine or on any subsequent quarter day by either party giving to the other a quarter's notice in writing, such notice to be deemed to be given if posted to the last known address of the party to whom it is sent in time to reach such party in the ordinary course of post.
- 2 The Tenant shall pay to the Landlord the yearly rent of Thirty two pounds on the usual quarter days without any deduction except for Landlord's property tax.
- 3 The Tenant shall duly and punctually pay all rates taxes and assessments whether Parliamentary, parochial or otherwise charged or levied upon the premises or upon the Landlord, owner, occupier or tenant thereof except property tax.
- 4 The Tenant will during the tenancy keep the premises in as good a state and condition as they are in at the commencement of the tenancy and shall so



- deliver up the same with the fixtures at the determination of the tenancy reasonably wear and tear and damages by fire tempest and inevitable accident alone excepted.
- 5 No part of the fabric or elevation of the premises or any wall or timber thereof shall be maimed cut or altered and no sale by auction shall be allowed on the premises without the written consent of the Landlord.
- 6 The Tenant shall not assign or underlet the premises without the previous consent in writing of the Landlord which consent shall not be unreasonably withheld.
- 7 If the rent hereby reserved is twenty one days in arrear, or any agreement on the Tenant's part is broken or if the Tenant becomes bankrupt or compounds with the greater part in value or number of his creditors the Landlord may enter upon the premises and determine the lease.

Signed by the parties hereto }  
in the presence of

Stephen Stagg

12 Merton Road, West Bromwich  
Brommenger

Albert Ross  
Augusta M. Hobbs

are all very well, but binding agreements are better for everybody—not that the majority of men are dishonourable, but because people have such short memories and such lively imaginations.

#### FORM OF LEASE OF A HOUSE.

Mr. S. P. Jones agrees to let, and Mr. T. J. Smith agrees to take, the house, No. 20, High Street, Bluetown, for a term of (—) years, beginning (*March 25th*, —), at a rent of (£28) a year. The rent to be paid quarterly on the usual quarter-days. The landlord to repair and keep in repair the outside; and the tenant to repair and keep in repair the inside of the premises (damage by fire, tempest and inevitable accidents excepted). The tenant to pay all rates and taxes except the landlord's Property Tax. The tenant shall not assign or underlet the premises without the written consent of the landlord, which shall not be unreasonably withheld. It is agreed that if the tenant does not pay the rent when it is due, or breaks any of the provisions of this agreement, the landlord may re-enter the premises and put an end to the lease.

Dated the (1st) day of (February, 1897).

Signed by S. B. Jones and T. J. Smith }  
in the presence of }

A. ROBINSON,

Butcher, Bluetown.

S. P. JONES.

T. J. SMITH.

Let me say that if you are taking a place on lease for *a long time*, you will be well advised to take the lease to a solicitor and have it perused by him, and this applies especially when you (the householder) intend to spend money on the place.

The next thing I would invite your attention to is this: the Act of Parliament requires the agreement to be *signed*. Now, as a rule, signature means ordinary signature—the way you sign your letters. But the judges have held under this Act that almost anything will do for a signature. Your initials will be enough, or your name stamped with one of those rubber stamps, or even a bill-head with your name printed on it. It must be **something intended to represent your name**, placed on the document by you or by your authority, and intended to show people that it is yours. Thus, if you write on a memorandum form, with a printed heading, "From John Jones," and do not sign the memorandum, the printing is meant to answer the purpose of a signature, but is printed to save you the trouble of writing it. The same argument applies to initials. If you sign "J. J.," that is meant to answer the same purpose as if you signed "John Jones." And, again, the signature may be put on any part of the paper—top, bottom, or at the side—it matters not, so long as it is there somewhere. I mention these facts in some detail, because many people think that though they are bound by what they sign (with the usual signature), initials have no virtue, and do not bind them at all. As you see, this notion is entirely mistaken, and I hope none of you will ever attempt to act upon it.

There is one point about the form in which leases ought to be. Suppose you have an agreement to take a house for more than three years and have not put it in writing, your agreement is bad in law. But it may be you did not know that the agreement was not binding, and you have gone into possession of the house. What is your position? In the first place, you are **in possession**



under an invalid contract; but, in the second, you are in possession with the permission of the landlord. If you came to me and asked how you stood, the first question I should ask is, "*Have you paid any rent?*" and if you answered "Yes," I should ask, "What rent have you paid? For how long a period?" Rent, as everybody knows, is generally paid quarterly or half-yearly, except under a weekly or monthly tenancy. Now, if you paid, and the landlord has accepted, a quarter's rent, or a half-year's, or a year's, you are in the position of a yearly tenant, and cannot leave or be turned out without six months' notice, expiring at the end of the year's tenancy. But if you have not paid any rent you can be turned out at any moment, or yourself may leave at any moment without notice. You are liable to pay a proportionate amount of rent up to the day you leave, but no more.

Now let me consider the different kinds of tenancies upon which you may take a house. It is always important to consider this point, because upon the nature of your agreement depends the important question of notice to quit. I will begin with

**Weekly tenants.**—A weekly tenant is a householder who holds from week to week. He pays his rent weekly, and **must give or take a week's notice to quit** the house. It does not follow that because you pay your rent weekly, therefore you are a weekly tenant. For instance, if you inquire about a house and the landlord says, "It is £13 a year, payable five shillings weekly," and you simply say, "I'll take it," you are not a weekly tenant but a yearly one. The safest thing for both parties is always to mention the time of notice required, because a working man, whose work may compel him to move at any time, does not want to be saddled with a house for a whole twelvemonth. You should always say, "Give and take a week's notice on either side," to which the landlord will generally assent without trouble.

**Monthly tenants** are similar to weekly tenants, except that in this case the holding is from month to month instead of from week to week. By this I mean that either landlord or tenant can give the other side notice to quit at the end of any month, but the notice must be given on or before the first day of that month. For example, you take a house by the month, beginning on the first of January. In a week's time you find the house inconvenient, and want to leave as soon as possible. You cannot give notice then and there to leave at the end of January. You must wait until the 31st of January and give notice to leave on the last day of February. In other words, a monthly tenant cannot leave except by giving a month's notice on the *last day of one month*, to expire on the *last day of the next month*. The rule cuts both ways, and the landlord must give exactly the same notice to the tenant as the tenant is bound to give to the landlord.

**Yearly tenants.**—Excepting the houses of the working classes the vast majority of houses in England are held by yearly tenants. A yearly tenant is one who holds, as lawyers say, "from year to year." In other words, he does not agree to take the house for any particular specified time, but he takes it in this way: He is bound to hold the place for a year. Then, if he does not give notice to quit, or his landlord does not give him notice, he becomes tenant for a second year; and if he does not give or receive notice to quit at the end

of that time, he becomes tenant for a third year, and so on, indefinitely. He may remain for one year only, or he may occupy the same house for half a century or more, though either he or the landlord could have put an end to their relations any year by giving proper notice. There are thousands of people who are yearly tenants without knowing it.

**Householders who are yearly tenants.**—If you pay your rent quarterly, or half-yearly, or yearly, you are a yearly tenant, unless you specially arrange with your landlord that you are to be a quarterly or half-yearly tenant. Many people think that if they take a house at so much a quarter, they are quarterly tenants. And they imagine that by taking a house at so much by the half-year, they are half-yearly tenants. This is not so. *Whenever you take a house under an agreement to pay rent by quarters or halves of a year, you are a yearly tenant, unless you specially stipulate that you are not to be.* You find this out when you want to quit the house.

**Notice to quit.**—A yearly tenant must give or take six months' notice to quit. The six months' notice must expire at the end of a current year of the tenancy. In other words, if you are a yearly tenant, and entered the house on Lady-day (March 25), you must give notice at Michaelmas (September 29). If you entered at Midsummer (June 24), you must give notice at Christmas (December 25). If you entered at Michaelmas (September 29), you must give notice on Lady-day (March 25); and if you entered at Christmas (December 25), you must give notice at Midsummer (June 24). It must always be *six months, expiring on the same date* at which your tenancy began.

**A FEW HINTS.**—A householder very often wants to be able to quit his house at short notice. He may be in some employment which renders him liable to be removed from one town to another at irregular intervals. For instance, an insurance agent or superintendent may at any time be sent to take charge of the company's business in another district, and such a person does not want a house on his hands, perhaps, for eighteen months. It is always best, therefore, to agree with your landlord that he will take some other notice than six months' expiring at the end of any year of the tenancy.

**Do not,** as I have known many people do, simply agree like this: "The parties hereby agree to give and take *a quarter's notice.*" Such an agreement was brought to me for an opinion the other day by a householder, whom I will call Tenant. Mr. Tenant took a house at Christmas, 1894. As he was a commercial traveller who might be put on another "round" at any time, he wished to be able to leave at a quarter's notice. So he wrote to the landlord, saying, "I suppose you will be willing to give and take a quarter's notice?" to which the landlord assented. In December, 1895, Mr. Tenant was told by his firm to take up another journey, which would necessitate his removal from London to Derby. At Christmas, 1895, he accordingly sent in a quarter's notice—that is, to leave in March. Imagine his surprise when the landlord refused to accept it. He consulted his solicitors, and they laid the case before me for opinion, and I was obliged to say that in law the agreement meant that each side could give or take a quarter's notice, but it must expire at the end of the year of tenancy. Consequently, the tenancy having begun at the Christmas



quarter, Mr. Tenant could not give notice until September, 1896. This meant that he would have the house on his hands until Christmas, 1896.

Now, what Mr. Tenant really wanted to do was to make an arrangement by which he could give notice on any quarter-day and leave the next quarter-day. What ought he to have done so as to secure this right? I will tell you. The only time when a yearly tenant can quit at any quarter-day is when he makes a special arrangement before he takes a house that he is to give and take a quarter's notice *expiring on any quarter-day*. Let me emphasise the fact that it is not enough to say, as Mr. Tenant did, "Both sides agree to give and take a quarter's notice"—you must add the words "expiring on any quarter-day," or words to that effect, or else it simply means a quarter's notice expiring at the end of a current year of the tenancy.

**When no notice to quit is necessary.**—If you make an agreement or take a lease for a fixed time, you can go out at the end of that time without notice. Thus, if you hold your house on a three years' agreement, beginning from the 1st of January, 1896, you need not give any notice whatever, but may leave on December 31st, 1898. On the other hand, your landlord is not compelled to give you notice. He can require you to leave on January 1st, 1899, and if you do not, he is at liberty to bring an action to have you evicted without any warning.

**At what time of the day must you quit the house?**—There is an astonishing amount of misconception on this point, although the question must arise very frequently. I make bold to say that if you asked twenty men under notice to quit their houses at what time of the day they must leave, at least eighteen of them would answer: "*At or before noon.*" And they would be mistaken, for so long as they deliver up possession *before midnight* of the day on which the notice expires they are within their legal rights. Thus, in a case where a man was a yearly tenant from Lady-day (March 25), and at Michaelmas he received a notice requesting him to deliver up the premises at noon on the following Lady-day, the notice was held to be altogether invalid. In other words, it was no notice at all, because the landlord had no right to ask him to go out before the *end* of his time, and did not give him a notice to go out at the end. If the notice had been simply: "I give you notice to quit the house, Number 25, High Street, on Lady-day next," it would have been quite valid; but by adding the words "at noon," the landlord spoiled the whole notice. But when you receive notice to quit, or, in the case of a tenancy for a fixed time, that time has elapsed, you must leave; for if you do not, the consequences are unpleasant.

**A tenant who does not quit after the landlord has given him notice to quit** is liable to have an action for double the *value* of the house for so long as he stops in; but the landlord must give the notice to quit in writing. **If the tenant gives notice**, and then does not leave on the proper day, he is liable for double the *rent* from the day he ought to have gone to the day he actually goes out. I hope you notice the difference. Landlord's notice—double value; tenant's notice—double rent. The rent may be either more or less than the value; but you may be pretty sure, when your landlord gives you notice to quit,

that the rent is not any less than the value, because a landlord is hardly likely to get rid of a tenant who is paying more than the house is worth. Another difference is, that the Act of Parliament giving the landlord double value after he has given the tenant notice, *only applies to tenancies from year to year, or for a longer fixed time*. It does not apply to weekly, monthly, or quarterly tenancies; but it does apply to yearly tenancies which may be terminated at a quarter's notice. The statute which gives the landlord a right to double rent if the tenant, after giving notice, does not quit, applies to all kinds of tenancies which the tenant has the right to put an end to by notice to quit. This includes weekly, monthly, quarterly, and yearly tenants; but it *does not apply to tenancies for a fixed time* (e.g. a lease for three or seven years), because the tenant has no power to give notice here. He must go out at the end of the fixed time. There is a third difference between the double value recoverable after the landlord's notice to quit, and the double rent payable after the tenant's notice has expired. The latter can be recovered in precisely the same manner as the ordinary rent, but the former can only be sued for. In other words, the landlord can "put the brokers in" for the double rent, or he can bring an action for it at his option; but he can only bring an action, and cannot distrain, for the double value.

It frequently happens that **a tenant whose agreement or lease has expired remains in possession** after such expiration. What is his position? Well, if the landlord chooses to demand possession, out the tenant must go, or else be liable for double the value of the place for so long as he remains. But frequently the landlord does not make any demand of possession; the tenant is not anxious to quit, and when the next quarter-day comes round he pays rent just as he was accustomed to do before. If the landlord accepts that rent, a new tenancy is created. The householder becomes a tenant from year to year (*i.e.* a yearly tenant) at the same rent as before, and subject to all the same liabilities as to repairs, rates, etc. The only difference between his former position and his present one is that formerly he held for a fixed period, while now he occupies subject to a half-year's notice, terminable at the end of any year of the tenancy.

**Another popular fallacy** to which I must draw attention is this: People commonly suppose that if, after giving notice to quit, they are a day or two or a week or two late in removing, or *do not give up the keys* on the day the notice expires, they become liable to pay a whole quarter's rent. There could not be a greater mistake. If you give notice to leave on the 25th of March, and do not go out until the 30th of that month, you are bound to pay double rent for five days, and not a penny more. If your rent is £26 a-year, your liability will amount to the sum of fourteen shillings and threepence-halfpenny, and even when you have paid this, you will have given your landlord one-fourteenth of a penny more than his due. I want you to take particular notice of this point, because I know as a fact that the fallacy to which I have alluded has gained wide-spread credence.

A learned friend of mine told me of a north-country landlord who regularly and invariably attempted on the last day of the quarter to keep out of the way of any tenant who had given notice to quit. The little game was to prevent the tenant from giving up the keys on the proper day, and when the unfortunate householder came round with them a day or two afterwards, to demand a whole



quarter's rent. According to my friend's account, this unscrupulous scoundrel must have made quite a small fortune out of his ingenious invention ; but I am sure that neither he nor any other of his kidney will be able to perpetrate that particular kind of swindle on my readers.

**The rent** is a most important item to the householder. There are several points in connection with it that deserve to be noticed. Most landlords make a special arrangement about it, such as "Rent payable weekly," or monthly, or quarterly, or as the case may be, and then you will have to pay at the end of each week, or month, or quarter. I mark the words "at the end," because I have heard of landlords who pretend that rent is always payable in advance. This is nonsense. You are never bound to pay your rent in advance unless you have agreed to do so. Sometimes nothing is said about the time when rent shall be paid, and the date of payment depends entirely on the kind of tenancy. A weekly tenant must pay at the end of every week, a monthly tenant at the end of every month, and a yearly tenant at the end of each year.

**The usual quarter-days.**—As I have said, it is usual, especially in the case of quarterly, half-yearly, and other tenancies for a longer period, to make an agreement as to the dates on which rent is to be paid. The ordinary thing is to say, "payable on the *usual* quarter-days." Now the usual quarter-days in England are Lady-day (March 25), Midsummer day (June 24), Michaelmas day (September 29), and Christmas day (December 25). I say these are the quarter-days in England as a rule ; but not quite always. For in the North—at all events, in Durham and Northumberland—the "usual" quarter-days ("term days," they are generally called there) are the 13th of February, the 13th of May, the 13th of August, and the 13th of November. So that if you happen to be removing from any other part of England into Durham or Northumberland, and on taking a house you agree to pay rent on the "*usual*" term days, do not make the mistake of thinking that you pay on the same days as in your old locality. The same remark applies to any reader who comes from one of those counties to live farther south.

**Rent is different from every other kind of debt** in more than one respect, because the landlord has the remedy of "distress," a remedy that no other kind of creditor has. For instance, if I owe you money for groceries supplied by you to me, and you owe me money for draperies supplied by me to you, and you ask for your money, I can deduct what you owe me from what I owe you, and pay you the balance. But **rent must be paid without any deduction of debts due from the landlord to the tenant.** I will show you what I mean. A lady hired a house in London, but before she went in she noticed that certain repairs were needed. She asked the landlord to do them, and he promised to see to it. He did not see to it, and when the lady, who had gone into the house, spoke to him again, he said : "Do the repairs yourself, and send the bill in to me." Upon this the lady employed a carpenter, paid him, and when quarter-day came round offered the landlord the rent, but deducted the amount of the carpenter's bill. The landlord most dishonourably objected, and when the lady declined to pay the whole rent, he refused to take less, and sent the bailiffs in to levy a distress on the furniture. The lady went to her solicitors ; but they advised her to pay what was

demand. If she wished to claim the money she had paid for repairs she must bring a separate action against her landlord in the County Court. The advice of the solicitors was sound, because, as I said, you cannot deduct an *ordinary* debt from rent. Why it is so, I have never been able to discover ; but it certainly is the law, and must be observed.

There are, however, *some deductions which can be made* from rent, but these are all cases of rates and taxes which ought to be paid by the landlord, but which he neglects to pay, and the rate- or tax-collector compels the tenant to pay them. I shall deal with these under the section of Rates and Taxes, where they will come in more appropriately.

Another peculiarity about rent is that the landlord can levy a distress (popularly called "sending the bailiffs in") the day after rent-day if the amount is not paid. Now, I have often been asked this question : "**Must I take my rent to my landlord, or must he come and collect it?**" The answer is : If you have executed a lease, or an agreement, look to see if it contains a clause like this : "The tenant agrees to pay to the landlord the yearly rent of £20 by equal quarterly payments on the usual quarter-days." Anything like that will do. What I mean is, look to see if your agreement contains words by which you *specially agree to pay the rent* to him. If it does, you must go and find him. If it does not, he must come to you. And he must come to you *at the house itself* on the rent day, between the hours of sunrise and sunset, and ask for the rent. He can, of course, send an agent if he likes. If you refuse to pay, or you are not at home, he is not bound to come again, but on the very next day he can send the bailiffs in. He cannot send them in the same day, even if you have told him that you don't intend to pay. The reason is, that though the rent is *due* at sunrise, it is not in arrear until midnight. In other words, you have the whole of the day to pay in.

Suppose that you could not raise the money on rent-day, and your landlord is a hard man. My advice is, to get it as soon as you can the next day, seek out the landlord or his agent, and offer the rent at once. I will tell you why. A landlord cannot distrain on you after you have tendered him the rent. If, therefore, he has already been to the bailiff and instructed him to come and take your furniture, the bailiff cannot come in after you offer the rent to the landlord. I knew a man once who did not happen to have his rent ready on the proper day, and the landlord threatened harsh measures. The tenant went out that night and borrowed his rent (ten pounds) from his friends. The next day, as he was breakfasting, he saw his amiable landlord, accompanied by two ill-favoured men, enter the garden. Seizing the money, which was on the mantelpiece, out rushed the tenant, and met the landlord on the steps. "Here," he cried, "is your rent." And the landlord had to take it then and there. The object of all this haste was, that if the bailiffs had once set foot inside the house, my friend would have had to pay not only his rent, but the bailiffs' expenses. By meeting his landlord on the steps he spoiled the little game, and the landlord had the pleasure of paying his myrmidons out of his own pocket. My friend, as he tells the tale, always chuckles at the recollection of the "sold" expression on the faces of those three men.



**Payment through the post.**—In these days of rapid postal delivery one frequently sends one's rent through the post. This is quite proper when the landlord *asks* you to do it, but not in any other case, and even when asked to send it that way it is prudent to use a *registered* letter, because it is a piece of carelessness to send money any other way. Registered letters do not often go astray; but if your landlord asks you to remit through the post, and you send by unregistered letter, and the letter is lost, the loss must fall on the landlord. In any other case the loss is yours.

**What happens if you do not pay the rent?**—In legal phrase, rent and distress go hand in hand. Whenever rent is overdue, the landlord has a right to levy a distress upon the goods that are on the land—including, of course, any that are in any building on the land. The points to be inquired into are—

- (a) *For what cause* may distress be levied?
- (b) *At what time* may distress be levied?
- (c) *By whom* may the distress be carried out?
- (d) *How* must distress be levied?
- (e) *What goods* may be seized for rent?
- (f) *What is to be done* with these goods?
- (g) *What is the cost* of a distress?

In answer to the **first** question (a): Distress may be levied *for overdue rent*. Rent is overdue the moment after midnight of rent-day, but if the tenant can tender (*i.e.* make an offer of) the amount before his goods are seized, no distress can be levied. You must be careful, if you want to make a legal offer of rent, or, indeed, of any other money, to offer it in the right way. In the first place, you must offer the *exact* amount which is due. You cannot demand change. In the second place, you must offer that amount in *coin* of the realm. Bank of England notes, gold, silver, and copper are *legal tender*—the notes and gold up to any amount, silver up to forty shillings, and coppers up to a shilling. A note of any bank other than the Bank of England is not legal tender; neither is a cheque, nor a banker's draft, nor a post-office order. But if you offer your landlord a cheque, or a postal order, etc., he cannot afterwards say you have not tendered the rent, unless at the time he took objection to the quality of the tender.

In reply to the **second** question (b): Distress may be levied at any time *between sunrise and sunset*, except on Sundays, Christmas Days, and Good Fridays. This law is exceedingly old, and its intention is, I suppose, to prevent people from being turned out of doors at night.

As to the **third** question (c), the distress must always be carried out either by the landlord in person or by a *certified broker*. At one time the landlord could employ anybody he pleased, but there were so many complaints of oppressive acts by brokers and their men that the Legislature interfered. A bailiff or broker who did anything illegal was always liable to an action for damages, but these men were frequently so impecunious that it was only throwing good money after bad to sue them; and thus they committed wrongful acts safely behind the bulwark of their utter poverty. But since 1888 no one can act as a broker or bailiff unless he has a licence from the County Court judge of the

district, and this licence may be cancelled by that judge, and will be cancelled by him, if a *well-grounded complaint* of oppression is made against the bailiff. If, then, you are so unfortunate as to have a distress levied in your house, and the broker or his men are uncivil, or act in a high-handed manner, threaten that you will complain to the County Court judge. That will probably have a soothing effect on them. If it does not, complain to the judge, and he will inquire into the case and punish the bailiff.

The **fourth** question (*d*) requires a very careful answer. In the first place, the bailiffs must not break open any door or window to get into the house. Breaking is here used in a very wide sense. It is breaking even to break open the lock of the garden gate, or push back the catch of a window, or even to open a window which is shut but not fastened. But he can lift the latch of a door, or turn the handle, because that is the usual way of entering the house. He may open still wider a door or window already partly open, but that is all. Innumerable are the dodges to which bailiffs resort in order to gain admittance to houses where rent is in arrear, and where the occupants are on their guard. The worst of it, from their point of view, is that all siege operations have to take place in the daylight, and their appearance generally betrays them, for there is a peculiarly seedy look about a broker's man that belongs to no other class. Dress him in good clothes, and he is seedy still. Disguise him as a postman, or a pot-boy, or a clergyman (all favourite ruses), and the experienced eye will still pick him out as a "bum-bailiff." One broker in a large way of business in London keeps a man whose real age is about forty, but who can "make-up" to look not much more than fourteen. This man is sometimes sent round to obtain a footing in a house after knocking at the door has failed to make any impression. The wary tenant, hearing a knock at his door, looks out of the window and sees a lad carrying a note in his hand—for better class districts, in the uniform of a page. A hurried glance up and down the street, and the door is opened a few inches and a hand extended to receive the letter. "Mr. Blank?" queries the lad. "Then I've to wait for an answer." And as the grip of the door-handle is relaxed, one quick movement and the "boy," *alias* broker's man, is inside. This particular move has rarely been known to fail. But it did once. The "page-boy" was tried upon a gentleman who had seen him before. The said gentleman called out of the window to go round to the back; and, nothing suspecting, the ambassador did go round to the back. But he was soon at the front again, closely pursued by a big dog which he had found waiting for him in the back garden.

When the bailiffs have effected a peaceable entry, they must hand to the tenant a written notice, stating the amount claimed and the cause of the distress. If the tenant is not at home, the notice may be left on the premises. The tenant can then request the landlord to have the goods appraised—that is, valued.

(*e*) **What goods may be seized for rent?** The landlord is entitled to seize anything he can find in the house, whether belonging to the householder or not, and also any animals that are there, no matter to whom they belong.

**Except—**

1. **Things in actual use** at the time the distress is made. For instance, if



the tenant's wife is using a mangle at the time the bailiffs enter, they cannot seize that article.

2. **Things delivered to a tenant in the way of his trade.** I mean, that if you carry on a tailor's business at your house, and someone has sent you a coat to mend, the brokers must not touch the coat. Again, there are many working people who take work from a factory to do at home. Many slop tailors give out cloth ready cut to be sewn and made into cheap clothes. The seamstresses invariably take the work home to be done. If the bailiffs should be put in for the rent, they cannot take or in any way meddle with the cloth.

3. **Animals of a wild nature cannot be taken; neither can sheep and beasts of the plough;** but all other tame beasts are liable to seizure. Parrots and canaries, are wild, and the broker must leave them alone; but if in cages they are tame, and can be distrained upon. Cats, again, are looked upon as wild and are privileged in consequence; but dogs are now regarded as tame and may be seized and sold for rent. An old friend of mine was once engaged for a householder who was defendant in an action for personal injuries. The plaintiff was a bailiff's man, who tried to seize a dog by way of distress. The animal received his captor's first caresses very indifferently; but when the man tried to muzzle him, the faithful mastiff resented it strongly, and in the end, instead of the man taking the dog, the dog took the man—or at least a piece of him. The injured one brought an action for personal injuries; but my friend for the defence set up that it was the plaintiff's own fault. "What would be the good of a house-dog, gentlemen, if he did not resent being muzzled by a stranger, especially by one with the plaintiff's aspect?" This argument struck home, for the broker's man, as my friend says, had about as villainous a cast of countenance as one ever saw outside a gaol. And as the jury probably contained one or two "doggy" men, they promptly found a verdict for the defendant. You may rely upon it, although your landlord, if he distrains, has a right to take your dog, he is not very likely to exercise that right upon a bulldog or a mastiff, nor even upon a terrier of plucky breed.

4. **Perishable things** cannot be taken, because before anything is sold, the tenant has always the right to pay the rent and the costs of the distress, and take back his goods in the condition in which they were. Now, if the landlord takes a perishable article, he may not be able to return it in that condition, and therefore he may not take it at all. A joint of meat, for instance, or a jug of beer, would go bad if kept long, and they come under the head of perishable.

5. **The tools of the tenant's trade are partially exempt.** The way the law looks at it is: it is important that a landlord should have his rent; but it is still more important that every man should have the means of earning an honest living. If you take away a man's tools, and thus deprive him of the means of work, he will very likely become a criminal. And so, in the public interest, every man's tools are exempted from distress *to the value of £5*. The expression "tools of a trade" has a very wide meaning. It includes all those things which a man has for the purpose of enabling him to make his living. Thus, the law-books of a lawyer, the ledgers and day-books of a shopkeeper or merchant, the saw and adze of a carpenter, are all the tools of their various trades. I said that up to the value of

£5 these things are quite free, and if there are more than five pounds' worth of them, the surplus must not be taken if there is anything else on the premises sufficient to satisfy the rent and expenses. Moreover, all tools actually in use at the time of making the distress are privileged from seizure.

6. **Wearing apparel and bedding** to the value of £5 are also exempt from seizure by the broker's man, and so are—

7. **Loose money and banknotes.**

8. **Cheques, promissory notes, bills of exchange, and other securities** for money (such as mortgage deeds) are liable to be seized; but they cannot be sold. All the bailiff can do is to bring an action upon them in the name of the tenant, and if the debtor pays, the rent may be deducted from the amount recovered.

9. The last kind of things which the landlord must leave untouched are **lodgers' goods**. There was a time when the goods of a lodger could be seized and sold to pay the landlord's rent, but it is not so now. In that part of this book relating to Lodgers, I will explain this matter more fully. Suffice it here to say that provided the lodger takes certain precautions, his goods are secure from the consequences of his immediate landlord's or landlady's impecuniosity.

(f) **When the goods of the householder that are liable to seizure have been seized, what is to be done with them?** The landlord has the choice here. He may, if he likes, allow the goods to stay on the premises and put a man in possession to look after them, or he may remove them to a place of safety, and keep them there. Then comes the sale. It may be news to many of you to hear that a landlord who seizes goods for rent is not bound to sell them at all. He can keep them as long as he chooses, by way of security for what is due to him. As a rule he does sell, but it is optional with him to do so or to refuse. If he elects to sell, however—and in a thousand cases out of a thousand and one he wants to sell at once—he must keep the goods *at least five days*, to give the tenant a chance to pay the rent and costs, or to allow anyone else to make a claim. The only time he can sell before the five days are up is where the tenant or owner of the goods tells him to do so. The tenant has a further privilege. He may want to raise the money and redeem his goods, and yet not be able to do so within five days. But *he can have the five days extended to fifteen* by giving notice in writing to the landlord to that effect. A verbal notice is no good whatever. I emphasise this point because though many people are aware that they can have the extra time by asking for it, not many know that it must be asked for in writing, signed by the tenant or his agent. Another point to be noticed is, that if the tenant asks for the extra ten days, he is bound to pay the extra costs of keeping a man in possession, and any other expenses caused by the delay.

Now, we will assume that in the five (or fifteen) days the rent and expenses of the distress are not forthcoming. The landlord has then the right to sell the goods, and here let me tell many people something which may be quite new to them. Until 1888 the landlord could always choose the place where the goods were to be sold. He could sell them at the house of the tenant, or he could take them to an auction-room and sell them there. Now, as many landlords and their agents, like Mr. Scrooge's partner, had no bowels, and did not care a straw about anything but



the rent, they often sold at the tenant's house, in an out-of-the-way spot, where only a few people were present. In the absence of any serious competition, good furniture was often knocked down for next to nothing. I myself once saw a piano worth at least seventy guineas, sold for exactly that number of shillings. At the same sale a valuable sideboard, which would have been cheap at £20, fetched eleven shillings only. As the rent owing was only £40, these two articles alone might, under favourable conditions, have realised enough to satisfy all that was due; but the hole-and-corner character of the sale caused the unfortunate tenant to lose heavily. Under the Act of 1888, however, the tenant has the **right** to demand that the goods shall be removed to a public auction-room and sold there. The expense of such removal must be paid by the tenant; but there is no doubt that any cost of cartage will be amply covered by the enhanced prices obtained.

It is, perhaps, hardly necessary to say that the brokers have no right to sell more than enough to cover the rent and expenses. The question (*g*) is, **what are the expenses of levying a distress?** This depends on whether the rent distrained for is £20 or less, or whether it is more than £20. In consequence of the outrageous bills run up by some brokers, the Act of 1888 fixed a scale of fees. These brokers often managed to make the expenses equal to the amount of the rent due, and sometimes even more. Now they are tied down, and cannot go beyond what the Act of Parliament allows them.

### I. Where the rent due is £20 or less.

	s.	d.
For levying distress ... ..	3	0
For man in possession, per day ... ..	4	6
For expenses of advertising the sale... ..	10	0
Catalogues, sale and commission and delivery, 1s. in the £ on the net produce of the sale (that is, 5 per cent.).		

### II. Where the rent is more than £20.

For levying distress—3 per cent. where rent is between £20 and £50; 2½ per cent. from £50 to £200; 1 per cent. if over £200.

For man in possession—per day, 5s.

For advertisements—the sum actually and necessarily paid. You are entitled to see receipts for the money.

Auctioneer's commission—7½ per cent. if the sum realised does not exceed £100; 5 per cent. on the next £200; 4 per cent. on the next £200, and so on, at a rate decreasing with the amount realised.

There is another subject which has given rise to much friction in times past, and that is, the right of the "man in possession" to demand his food. I have been told that it is an invariable custom for this unpleasant visitor to ask his unwilling host to supply him with food and drink, and I believe that people who do not know their legal rights often supply the bailiff's man with good food and beer *ad libitum*. Let me say at once, *this practice is absolutely illegal*, and if any householder has this demand made upon him, he should refuse point-blank. And if the man in possession makes himself unpleasant about it, straightway report him to the County Court Judge.

### Some more rules about distress.

1. *The landlord is entitled to distrain for six years' rent* unless the tenant is bankrupt, and then he can only take one year's. Or if a creditor for an ordinary debt has sent in an execution, the landlord has a right to stop the removal or sale of the goods unless one year's rent is paid first.

2. *No one can distrain twice for the same rent.* If I owe a hundred pounds rent, and the landlord comes in and takes my furniture, or some of it, and sells it for, say, £80, he cannot distrain upon me for the balance of £20. He can bring an action in the County Court for it, but that is all.

3. If the tenant *fraudulently removes his goods* so as to avoid a distress for rent, the landlord can follow those goods and seize them at any time within six months, unless they have been sold.

4. If at any time *before the goods are actually sold* the tenant offers to pay the rent and the other legal costs incurred up to date, he has an absolute right to have his furniture returned.

**Besides distraining** on you, the landlord has a right to bring an action against you for the rent due, just as for any other debt. Sometimes there is a covenant in the lease or a clause in the agreement: "If the rent shall be in arrear for 21 days after the same shall have become due, the landlord shall have the right to enter the premises and put an end to the tenancy." In reference to a similar clause referring to an agreement by the tenant to repair, I shall show you (p. 156) that before the landlord can act on his agreement and forfeit the lease, he must give the householder notice. This does not apply to the present case. When there is *a condition that the lease shall be forfeited* if you do not pay your rent punctually, the landlord can take steps to turn you out the very day after the last day for payment.

### REPAIRS.

A householder, when he agrees to take a house, should always be particularly careful to arrange about repairs. A great many people do not know it, but it is a fact, that **unless a landlord agrees to repair the house, he is not liable to do any repairs whatever.** The house may tumble down about your ears, but the landlord draws his rent all the same, and you cannot in any way compel him to make the place fit to live in. On the other hand, **the tenant is not compelled to repair** unless he has made an agreement to do so.

Now, suppose you have a state of things like this: You have taken a house as a yearly tenant, from Christmas—which means, as you have read on the previous pages, that you can only leave in any year at the Christmas quarter. In November one of the front windows blows in—I do not mean simply a pane of glass, but the whole window-frame. You go to the landlord and tell him about it, upon which he remarks, "My dear sir, *I don't suffer any inconvenience through the absence of that window.*" You ask him to have it mended, but he absolutely refuses. Now, where are you? You are in this position: You must either mend the place or give up the use of the room. You cannot give notice to quit until next year, because Michaelmas is just past, and that is the only day upon which you can give notice. So you have this dilapidated place



on your hands for thirteen months or so. The practical result is that you must repair the damage yourself, unless you are prepared to take another house and pay two rents for more than a year.

On the other hand, if you can afford to be so unpleasant, the landlord is in an awkward place, because if the window is not put in by someone, the rain and snow will come in, and the house will soon go from bad to worse. The best thing you can do is to compromise, and share the expense between you.

I have not given you a fancy sketch of something that might happen merely. It has happened scores of times, probably, and once certainly within my own experience. A window frame was blown in. The landlord refused to mend it because he had never agreed to repair, and the tenant, on his side, refused because he had not caused the damage. In this case the tenant left the house and hired another. Then the landlord wanted to go in and repair the window; but the tenant would not allow him to enter the place at all. "It is my house," he said, "until my tenancy is up—next Christmas." The other belligerent went to his lawyer, and demanded to know how he (the landlord) was to get into his own house in order to repair it. And the lawyer had to advise that there was no way. For it is a fact that *once a landlord has let a house he cannot enter it* while the tenancy lasts, unless the tenant chooses to give permission. If your landlord puts his foot into your house, he is a trespasser, unless the local Sanitary Authority order him to come in and mend the drains, etc. That is why you see in most leases a clause to this effect: "The landlord or his agent shall have the right to enter the premises at all reasonable times."

There is some limit to the state of things I have described. By the Public Health Act, if a house is in such a condition as to be a **nuisance and injurious to the health of those who live in it**, the local sanitary authorities may step in. They may give notice either to the owner or occupier to do whatever is necessary to put the place in order. Generally they adopt this rule: If the house is a big or middle-sized one—say, over £30 rent in London, or over £20 in any other town, or even at a less rent in country places—the kind of house occupied by a shopkeeper, or anybody except a working man, they generally serve the notice on the householder, and make him do the repairs. But if those repairs are very considerable, they make the owner execute them. For instance, there is just one drain pipe stopped up, enough to make the house unhealthy but not requiring any extensive alterations. In this case they will probably make the householder put it right. But if the whole of the drains have to be pulled up, or if part of the house has to be rebuilt, they will usually compel the landlord to pay the cost.

But the Sanitary Authority has no power to interfere unless there is something injurious to health, or likely to be injurious to health. What this is, depends on the facts of each particular case, and also, sometimes, on the whim of the doctor who is medical officer of health for the town or district. Most doctors would consider a hole of considerable size in the roof to be injurious to health; but I am not so sure about the case of the window. Some will say—"What! A window out injurious to health? Certainly not. It will let more fresh air into the place." Others take this view: "Window blown out? Most injurious to health, my dear

sir. Why, all the people will catch their death of cold." Like many other things, it all depends on the way you look at it.

A **second case** in which the sanitary authorities can interfere is with regard to *houses of the working classes*. An Act of Parliament has been passed with a view to prevent people from living in ruinous old buildings, and practically to compel landlords to provide decent accommodation for their poorer tenants. You may often read in the newspapers of cases under this Act. The way it works is this: The sanitary inspector reports to the medical officer of health for his district that a certain house is so much out of repair that it cannot be mended. The medical officer makes an inspection, and if he agrees with the inspector he also makes a report to the like effect. Then the owner of the house is summoned before a magistrate, who has power to do one of two things. He can either order the place to be shut up for so long, so that it may be thoroughly repaired (to the satisfaction of the authorities), or he can order it to be closed altogether. The second order practically means that the house will have to come down. The value of this Act to the working classes of our large towns and cities cannot be over-estimated. The Act is most carefully administered. There are some of the London magistrates who never make an order without first going to look at the place themselves. This has a double value, for not only are they enabled to form a correct conclusion on the particular case, but they often cast their eyes upon other property fit only to be done away with. By means of this law we may hope, in course of time, to see the horrible rookeries of cities and towns entirely demolished, to make room for more commodious and more healthy dwellings for the toiling masses of the people.

Now let me consider how the question of repairs stands *when the landlord and tenant have made some agreement about repairs*. You may say, speaking roughly, that such agreements are not made unless the tenancy is at least a yearly one, and they are *invariably in writing*. I shall put down the most usual of the agreements that are made, and then tell you what the effect of each one is. Then the next time you want to make an agreement with your landlord you will know the effect of what he wants you to sign.

1. "**The landlord agrees to do all external and the tenant agrees to do all internal repairs.**" This is a very usual kind of agreement, and questions arise sometimes as to what repairs are external and what are internal. Take this case: The house is semi-detached and there will be, of course, one wall between it and the house next door, called a partition-wall. There was a case once in which this wall fell into disrepair—I think it cracked. The landlord argued that it was not external because it was not outside the house. The tenant, on the other hand, contended that as it was one of the boundary walls it was external, and the judges decided that it was external. The landlord, therefore, was ordered to repair it. Another question that arises is, *What are repairs?* In the severe winter of 1894-1895, when an unburst water-pipe was the exception rather than the rule, there must have been hundreds of disputes upon this point. An ordinary layman would say, "Repairs? Everybody knows what repairs are. It means when you have to mend something." Let me put a case to you. Your pipe bursts. It is only a very small hole, which the plumber can solder up in half an hour. That is clearly a



repair. Again, suppose the rent in the pipe is three inches long, and the plumber is obliged to take out a foot of piping and put in a new piece. Again it is a clear case of repairing. Now, let us go a step farther. You have a rent of six inches in one place at the top of the pipe, another rent of three inches two yards farther down, a little hole a few feet lower, and a big rent about a yard from the bottom. The plumber declares it impossible to *mend* a pipe in that condition, and advises that a new one should be put in. You claim that you are not bound to do this, because to put in a new pipe is not to repair—it is practically to rebuild. You are wrong, and I will tell you why. Your agreement is to repair the inside of the house. Putting in a new pipe in place of an old one is not repairing *the pipe*, it is true, but it is repairing *the house* according to your agreement.

2. **“The tenant agrees to keep the house in repair, except structural repairs,”** is another common form of agreement to repair. This is very wide as against the householder, because very few repairs come under the head of structural. Structural repairs may be said to be *all those which are necessary to maintain the house as a house*. For instance, if one of the slates, or two or three, come off the roof, the tenant will have to put them on again. But if half the roof goes, the landlord must mend it. If the front door is cracked in one panel, this is for the tenant; but if the whole door goes, it is for the landlord. Broken panes of glass in the windows must be seen to by the householder, but not a whole window which had by any means been blown out. It is not uncommon for a staircase to collapse, and this would be structural damage which the tenant would not be obliged to repair; but if one step of the stairs gave way it would not be structural damage, and the householder must make it good. If one board, or even two, of the floor gives way, this is an ordinary and not a structural case; but if the floor is so rotten that a whole new one is required, it is a structural repair, and not for the tenant.

It is difficult to define with absolute accuracy the effect of the words “structural repairs.” It is sufficient, I think, to say that repairs which are required simply to maintain the house as a comfortable and convenient residence are *not* included in the phrase. But **considerable repairs to the main fabric of the place**, including floors, roof, ceilings and walls, are structural. A good many householders who enter into the agreement now under consideration, imagine that their liability is very much less than it really is. They seem to think that they are not bound to do any repairs to what I may call the essential parts of the house. For instance, they would object to be called upon to put a new board in the floor in place of a broken one. They would object to put two or three slates on the roof, and so on. They argue in this way: “The floor and the roof are parts of the structure, and I do not agree to repair these.” That is quite true. But if you argue in that way you cut down the agreement to nothing at all, for surely every part of the house is part of the structure. And if you are not to repair *any* part of the house, what is the good of saying, “the tenant agrees to keep the house in repair”?

What I want to impress upon you is this: You must not strain the exception (“*except structural repairs*”) any more than the landlord will be allowed to put a forced construction on the agreement. The law gives you both credit for meaning something when you put your names to the paper, and if you cannot

agree as to what was meant, a judge will be obliged to say that you both meant the words to be understood in a reasonable way. The moral is: do not be captious, and quarrel about next to nothing, for a judge is just as likely to think your opponent is reasonable as to think that you are reasonable. And in deciding for yourself before going to law on an agreement, always give a fairly liberal construction to the part which favours the other side. I do not advise anyone to succumb to an extortionate demand, but I do want you to understand that when you use indefinite expressions you must not be surprised to find that they bear meanings other than the one you yourself had in your mind's eye at the time you made use of them.

It is far better to be a little more definite and precise to begin with. If you want the landlord to be responsible for the four walls and the ceilings and the roof altogether, nothing is more easy than to say so. Many men have a horror of long agreements. "Put it as short as you can," is an instruction frequently given by the average man to his solicitor. As often as not the solicitor has to use wide and general expressions instead of going into detail, and when some dispute arises between the parties, one reads the general expression his way and the other his way. "Brevity is the soul of wit," we know. But no one looks for wit in a legal document. Accuracy is the main point.

3. **"The tenant agrees to repair and keep in repair the premises during the term."** This is another form of agreement, not so common as the others, but still not at all unusual. The scope and meaning of such an agreement is practically this: the householder is bound to keep the place *in as good condition as it was when he went into it*. I do not advise any tenant to make such an agreement, and I will tell you the reason. It is because he is literally bound to carry out that agreement, at whatever cost. This doctrine was illustrated by a case that occurred during the Civil War between Charles I. and his Parliament. A tenant had taken a lease of a farm and farmhouse for twenty-one years, and he had agreed that he would "repair and keep in repair." Now the tenant was a sturdy Roundhead, an adherent to the cause of the Parliament, and one day he received an unwelcome visit from Prince Rupert, who pitilessly set fire to the house and burnt it to the ground. The farmer not unnaturally thought that when his house had been destroyed in this manner, through no fault of his own, the lease was at an end, and he did not rebuild the house. When the war was over, the landlord brought an action upon the agreement, claiming that the tenant ought to "repair"—in other words, put up a new farmhouse. And the judges decided in the landlord's favour. True, they sympathised with the tenant, and said it was exceedingly hard on him. At the same time he had of his own free-will agreed "to repair and keep in repair," *without any qualification whatever*, and he must be bound by that agreement. My advice to householders is this: never sign a lease by which you undertake to do all the repairs without inserting this qualification:—"Damage by fire and tempest and inevitable accident excepted."

4. **"The tenant agrees to keep the premises in repair, damage by fire and tempest, inevitable accident, and reasonable wear and tear**



alone excepted." This form of agreement is very favourable to the tenant. It practically leaves him little to do, except to repair damage caused by himself, or his family, or servants. But it may leave him a few other duties of repair. Thus, if a small boy throws a stone through the window, the broken pane is not caused by fire or tempest, neither was it an inevitable accident, nor can it fairly be described as wear and tear. Therefore the tenant must pay the glazier to put in a new piece of glass.

The words "inevitable accident" have given rise to a good deal of controversy, and it is a matter of some difficulty to see what they really mean. It seems probable that if you used the word "accident," leaving out the "inevitable," it would have precisely the same effect. Now an accident, or inevitable accident, means *an untoward event which an average man, by exercising average care and foresight, could not prevent*. For instance, the winter of 1894-5 was very severe. As most readers will remember, there was a frost of almost unparalleled continuance, and consequently many pipes were burst. Now, if those pipes were laid so as to be capable of resisting an average amount of frost, they were burst by inevitable accident, because no human being can foresee the coming of a winter like that of 1894-5. But take another case. I have grass land alongside a railway line. In the summer I cut the grass and leave it out to dry. In fact, I leave it for many days longer than is necessary. When the grass is as dry as tinder a spark from one of the railway engines alights on it, with the result of a big fire. The flames run along and spread to my house, which is burnt to the ground. This is "damage by fire," of course, but is it *inevitable* accident? At least four people out of six will answer, "Yes"; but it is not so. I left my hay on the ground longer than was absolutely necessary. As a reasonable man I ought to know that railway engines emit sparks, and that there is a likelihood of one of these sparks alighting on my hay. I also know, or ought to know, that sparks, even one spark, will probably set dry hay on fire. It is not, therefore, an inevitable accident, though it is an extremely unfortunate occurrence.

It is unreasonable for a landlord to ask a tenant to agree to do more than repair, "fire, tempest, inevitable accident, and reasonable wear and tear excepted," unless the tenant has a long lease. A yearly tenant, for instance, or a tenant for anything less than three years, is very foolish to agree to do more. It is quite fair, however, for a landlord to ask a tenant to repair (leaving out the "reasonable wear and tear" clause) when the agreement is to be for, say, five years. And in London, where the bargain is more in the landlord's favour than it is in other places, it is not unusual to omit the "wear and tear" exception, even in a three years' agreement.

5. "The tenant agrees to keep the premises in tenantable repair." This means, or may mean, that the tenant is bound to leave the place better than he found it. For "tenantable" repair clearly indicates that state in which it would be likely to be let to persons of the class likely to inhabit it. For instance, if you undertake to keep in good and "tenantable" repair a twelve-roomed house in Belgravia, you have undertaken a far heavier responsibility than if you had agreed in the same words about a twenty-roomed house in

Stepney, because it is obvious that the class of people likely to require a house in Belgravia would expect a better state of things than would the class of people likely to live in Stepney. There is in effect no difference between "good," "substantial," "tenantable," and "habitable" repair, so you may apply my remarks on the word "tenantable" to the other three.

**The meaning of "repair."**—It is always well to look at the meaning of words commonly used in an agreement, for then you know what it is you are rendering yourself liable to do. When a tenant agrees that he will **repair** the house, or will keep it in repair, he ought to know what is meant by the word "repair." It is impossible to define the term in such a way as to meet all cases, because repairing an *old* house is a very different thing from repairing a *new* one. Some landlords who let old houses, with an agreement by the tenant to repair, try to make the tenant practically construct a new building. But this is not what the law understands by repairing. The law says, you must take into account the *age and condition* of the premises at the time they were let, and an agreement to repair does not bind the tenant to make good those dilapidations which result from the natural operation of time and the elements. Houses, like men, wear out, and, as it were, die a natural death. The action of the air and the rain insensibly causes the mortar to crumble, the bricks to crack, and the woodwork to decay. These ravages of time are to be borne by the owner of the property, and not by the householder.

But these remarks apply to the decay of the house as a whole, and not to the wreck of a particular part. Take, for instance, an old house, where a couple of slates fall off the roof, or half-a-dozen bricks become loosened from the chimney-stack by the ordinary wear and tear of time and the elements. The tenant who has agreed to repair must make these good. Suppose, however, a whole side of the house sinks, owing to the foundations being worn out, the tenant's agreement to repair will not cover this. To put it another way, if you agree to repair a house, you do not undertake to rebuild it as a house, though you are liable, if necessary, to rebuild a small portion of it.

The word "repair," again, must be read with reference to the condition of the house when it was let to you. It is not incumbent on you to leave the house *substantially* better than you found it. Be careful to note the word in italics, for you may be bound to leave the house better than you found it in some small respects—details only. As, for instance, if you agreed to repair, and when you went in you found the windows all broken. You are bound to mend them, and when you leave the house you must take care they are all whole. If when you give up the keys the landlord finds some panes broken, he can make you pay for them. It will be no defence for you to say that they were broken when you first entered the house.

In short, if you agree to repair a house, you must keep it in as good a condition as any reasonable man would expect to find such a house of the same class and age. You will not be expected to spend as much money on a cottage in Bermondsey as on a mansion in Belgravia, nor on a residence in Poplar as on a house in Park Lane.

**Is painting a repair?** "I have agreed to repair my house. Now my



landlord wants to make me paint it. Has he any right to put me to that expense? I never agreed to do the painting." Such is the tale of woe sometimes poured out by a householder whose landlord has fallen foul of him in the way described. Let me answer the question:—You must paint the inside woodwork, at all events, in due course, which means once about every three years. As a rule, you are not compellable to paint the outside of the house, if your agreement was simply to repair. *It is always better to have a special arrangement about painting.* Sometimes the landlord agrees to paint the outside, and the tenant the inside. This is usual when the agreement is for a three years' tenancy. Where the lease is longer, the tenant must not be surprised to be asked to agree to paint both inside and outside, and this is especially so in London. In many other places the landlord agrees to paint the outside, though the lease may be a long one.

**The householder's duty not to destroy the property** is the next thing to be considered. I have shown, I hope conclusively, that there is no positive duty on the householder to keep the house in repair, unless he has contracted to do so. But there is a duty on him to refrain from destroying or damaging the property, quite apart from any contract whatever. If I break the panel of your front door, what does it matter whether I am your tenant or not? The door is damaged all the same, and your loss is just as great in the one case as in the other. To be plain: a tenant has no more right to damage the house he lives in than to damage any other house.

Some of my readers may think, perhaps, that I insist on this point at a length quite too tiresome. But let them consider the conduct of many occupiers of dwellings in England, and they will not be at all surprised to hear that one has the greatest difficulty in the world to convince many people that they have no right to damage the houses they live in. Don't you know many householders who think nothing of driving a lot of nails into the doors of their houses, who knock pieces of plaster out of the walls, cut up the woodwork to suit their own convenience, and commit a variety of other wasteful acts? And little Tom, with his new knife, hacks pieces out of the stair-rail, or carves his name on the window-sill.

Let me say at once that all these damages will have to be made good by the tenant, whether he has agreed to repair or not. He is bound to see that the house he hires is not damaged by himself, his family, servants, and guests, and if he does not repair their dilapidations before he quits the premises, the landlord can bring an action for damages against him.

**Can a tenant make alterations in the house?** A householder sometimes wishes to make some alteration in the house he occupies, in order to render the place more convenient as a dwelling. For instance, you may think it would be better if you could make one room into two by putting up a partition. Or you may want to convert two small rooms into one large one by knocking down a wall or partition. Or you may want to turn a sitting-room into a kitchen by fixing an oven there, or a bedroom into a bathroom by adding a permanently fixed bath and taps. You ought always to ask and **obtain permission of your landlord** before you begin an alteration of this kind. I will tell you why. It is because you have no right to make a permanent alteration of the character and arrangements of the house which does not belong to you. If the house does not

suit your convenience, do not take it. For though your alterations may seem to you to make the house more convenient, they may not seem so to the next person to whom the landlord tries to let the place. For example, if you hire a house with four bedrooms, one of which has a dressing-room leading out of it, you may think it better to pull down the partition-wall, and add the area of the dressing-room to the bedroom. But when your lease is at an end, and the landlord tries to let the house to Jones, Jones objects that his bedroom has no dressing-room attached. He would willingly sacrifice some of the bedroom if he could only have the other convenience. You have, therefore, deprived your landlord of the chance of a tenant.

The complexion of the house is a matter for the owner, and no one else has a right to alter that complexion. Such things as blocking up a window, putting in an extra window, altering the character of a room permanently—as by putting a fixed bath into a bedroom so as to make it permanently a bathroom; planting large trees in front of a house so as to alter the view or to diminish the light; turning a grassy lawn into a flower garden, or a flower garden into a lawn—these are all things which a tenant must *not* do unless he first has his landlord's consent. It is in law every bit as bad as damaging the place by chipping holes in the walls, etc., because although you may not make the place less valuable as a selling property, you are altering its character.

**The forfeiture of a lease.**—If you enter into a three years' agreement or any lease for a longer period, you will almost invariably, on reading the document you are asked to sign, come across a clause like this: "Provided always and it is hereby agreed that if the rent shall be in arrear for twenty-one days (whether legally demanded or not), or if the tenant fails to observe and perform the covenants herein contained, it shall be lawful for the lessor to enter into and enjoy the demised premises and to determine the lease." Sometimes a further little bit is added to this effect: "The landlord shall have power to enter and **forcibly** eject the tenant, provided that he uses no more force than is necessary." But the last-quoted clause is illegal. You are not allowed to agree that in certain events the landlord may take forcible possession of the premises. Several hundreds of years ago you could so agree; but even so long ago as Richard II. it was found seriously detrimental to public peace and order to allow landlords to turn out their refractory tenants by force. Serious tumults arose not infrequently, and some lives were lost. In the end the king interposed, and secured the placing on the Statute-book of a law forbidding forcible ejections by those who claimed to be the rightful owners of land.

*What is the intention of a forfeiture clause in a lease, and why is it put there?* The answer to the first question is pretty obvious. It is to place in the hands of the landlord a weapon by means of which he can compel the tenant to perform his share of the agreement. For a tenant who has agreed, for instance, to keep the house in repair, is far more likely to adhere to his promise if he knows that the failure to do so may result in his being turned out of the place before the lease has expired. Let us consider what would happen if there were no forfeiture clause. The tenant fails to perform his promises (*covenants* is the legal name). He has promised to keep the place



in repair, and he allows it to go to rack and ruin. He has promised not to take in lodgers, but he lets every room. He has promised to pay rent, but not one penny does he ever pay. The landlord brings an action for damages for breach of covenant, and damages are awarded. The tenant simply laughs. He says, "I have no money to pay, and no property for you to seize." Then the landlord is in an awkward and unsatisfactory position. He cannot levy execution on the lodgers' goods. The tenant has possession of the house, and avows his intention of keeping it until the lease is up. If there is no forfeiture clause, the landlord can do nothing. But if a forfeiture clause be inserted in the lease or agreement, then the landlord can at all events *re-take possession of the house* and re-let it to a more desirable tenant.

Like many other legal methods originally invented to remove a grievance, forfeiture clauses were sometimes perverted into instruments of oppression. Thus, if I take a lease of a house for twenty-one years, and afterwards sub-let it to another tenant, I have agreed to keep the house in repair, and did so while I was in possession. But my sub-tenant allows it to fall into disrepair, a fact of which I am ignorant. My landlord now wants to forfeit the lease. In the old days he could do so: I had agreed to keep the premises in repair, under penalty of forfeiting the lease; I did not fulfil my agreement; therefore the lease was forfeited. But nowadays, when the landlord wants to exercise his right of forfeiture, *he must first give reasonable notice, in writing*, to the tenant, stating the ground of complaint, and demanding that it shall be put right. If the tenant, after this notice, fails to carry out his contract, then the landlord can forfeit the lease. But if the tenant complies with the notice, and pays the landlord a reasonable compensation for not having done it before, there will be no forfeiture. For instance, if you have agreed to repair your house under penalty of forfeiting the lease, and you fail to keep the place in good order, your landlord cannot turn you out *instantly*. He, or his agent, must write to you in this sort of way:—

I beg to give you notice that you have broken your covenant to repair. There are several slates off the roof, the railings are all down, one panel of the front door is broken, etc., etc. I require you to repair the same within one month from this date, and to pay me £3 3s. as compensation, and £2 2s. expenses of my surveyor and solicitor.

(Signed) JOHN SNOOX

To Mr. William Doox.

You must then set about the repairs at once, and pay the £5 5s. demanded. Of course, you are not bound to pay any sum the landlord likes to ask, but you are bound to pay any reasonable sum he claims. If you do not repair, **what steps can the landlord take?** Well, he can demand possession of the premises from you, and if you do not give the place up, he may bring an action to recover possession. As he will in such circumstances be sure to win, you will then have the pleasure of a visit from the sheriff's man, who will turn you and your goods and chattels into the street—a process usually accomplished with more speed than ceremony. If you do not open your doors to the sheriff's man, that pleasant functionary has a right to break his way in. This procedure is called an *eviction*, a thing which many people think is only used in Ireland.

They are mistaken. It is in practice all over England, and I venture to assert that there is not a day (except Sunday) which passes without at least one eviction in some part of England or Wales.

The tenant who enters into a repairing agreement with a forfeiture clause such as I have described, although his lease cannot be forfeited without notice, nevertheless is bound to repair without notice. This may not seem clear on the face of it. I mean that the tenant who agrees to repair is bound to do so without any notice from his landlord. If he does not, the landlord may at once commence an action for *damages* for breach of agreement, but he cannot bring an action to evict the tenant without giving notice to do the required repairs.

**Notice to the landlord to repair.**—When the tenant agrees to repair, he ought to repair without notice, otherwise the landlord may bring an action for damages. But when the landlord agrees to repair, you must always give him notice of such repairs as are necessary to be done. There is a good reason for the distinction here made. The tenant is on the premises, and knows when they are out of order. The landlord is not on the premises, and has no right to come and inspect them. How is he to know what repairs require to be done? And so you must give warning to him of the condition of the premises, and then, if he does not do his duty, bring an action for damages, or do the repairs yourself, send in the bill to the landlord, and if he does not pay at once, sue him. Some agreements say that notice in writing shall be given to the landlord; but where the agreement is silent any kind of notice will do—word of mouth, letter, message, telegram, or anything else, so long as you tell him somehow. At the same time a written notice, sent by registered post, is the best, because you can prove then that the document was received by him.

**Rates and Taxes.**—The rule of law in reference to rates and taxes is, that in the case of houses of small value (*see* p. 158), the rates and taxes have to be borne by the landlord, while in the case of houses of larger value, the tenant is generally, but not always, liable.

You can, if you like, make an agreement that you (the tenant) will pay all rates and taxes, or your landlord may agree to pay them all. First, I will consider the effect of these agreements, and then proceed to show the liabilities on each side where there is no agreement. And first—

**When the tenant agrees to pay all rates and taxes,** he must pay them all except the Property Tax and the Income Tax. With regard to these two, the law is somewhat peculiar. *Even if the householder promises to pay these two taxes,* he cannot be made to pay them by the landlord. What happens is this: if the landlord does not pay Income and Property Tax, the tax-collector can demand them from the tenant. Then the tenant must pay, and can deduct them from his next rent. I repeat, his *next* rent, for if he forgets to deduct them from that, he cannot deduct them from any other. Thus, if my rent is due quarterly, on the 1st of January, 1st of April, 1st of July, and 1st of October, and I have to pay Property Tax in March, I must deduct it from the April rent. I cannot in any circumstances deduct it from the July rent, because that is not the *next*, and the Act of Parliament says “next” in explicit terms. The correct way of stating



the law is, that as between the public and the tenant these taxes are the tenant's, but as between the landlord and the tenant they are always the landlord's.

**When the landlord agrees to pay all rates and taxes**, he must pay them. But what if he does not? Well, just as I have explained in the case of the Property Tax, the public officers have a right to collect all rates and taxes from the tenant, leaving him to settle up when he pays his rent. If he is forced to pay after the landlord has agreed to do it, the proper course is to deduct all such payments out of the rent. Here, again, the householder should take it off the *first* rent due.

To sum up. *All* rates and taxes levied on the house or on the rent (as Income Tax) are payable by the tenant to the rating and taxing authorities. But when the landlord has agreed to pay them, they can be deducted by the householder from his *next* rent. Moreover, Property Tax and Income Tax are always landlord's taxes, whatever the agreement may be.

**When there is no agreement**, the subject becomes a little more complicated. As I said, all rates and taxes can be collected from the tenant by the authorities, who have no concern with the arrangements between landlord and tenant. But as between the householder and his landlord, some taxes and rates are payable by one and some by the other.

**In small houses of less than a certain value**, rates and taxes are in almost every instance payable by the landlord and not by the tenant. The only exception, so far as I know, is Gas Rate, which must always be paid by the tenant. With that exception, the vestry or other rating authority can, and generally does, make the owner pay the rates and not the occupier in cases where the house is let on a weekly or monthly tenancy, and where the house is not above a certain rateable value :—

£20 or less in London ;  
 £13 " " " Liverpool ;  
 £10 " " " Manchester or Birmingham ; and  
 £8 " " elsewhere.

If the landlord does not pay, the occupier can be compelled to do so, or his goods may be seized. But if he pays he may stop it off the rent.

What this means is that when you live in a house of less than the value I have stated, you will not, as a rule, be called upon to pay any rates. They will be collected from the landlord. The rule about **Water Rate** is that the landlord is bound to pay it if the house is worth not more than £10 a year, whether in London or anywhere else. The **General District Rate** on houses of £10 a year and under, and on houses let to weekly or monthly tenants, must be levied on the landlord of the house and not on the tenant. So that you are not bound to pay Water Rate or General District Rate if you live in a house of £10 a year or less rateable value. The rateable value is generally a good deal less than the rent. Thus a householder may be paying £12 or £15 a year rent, and yet not be rated at above £10. **In houses where the rent is larger, and the tenancy is quarterly, or yearly, or longer, and no agreement about rates and taxes has been made, you are in this position :—**

**I. The landlord must pay** (a) *Income Tax* on the rent ; (b) *Property Tax* ; (c) *Land Tax* ; (d) *Sewers Rates* ; (e) *The Tithe-rent Charge*.

But in all these cases except the last the tenant may be made to pay if the landlord does not, and he may deduct the amount so paid from his rent.

**II. The tenant must pay** (a) *Poor Rate* ; (b) *Inhabited House Duty* ; (c) *County Rate* ; (d) *Borough Rate* ; (e) *Highway Rate* ; (f) *General District Rate* ; (g) *Police Rate* ; (h) *Lighting and Watching Rate* ; (i) *Water Rate* ; (k) *Gas Rate* ; (l) *Tithe*.

There is a difference between Tithe and Tithe-rent Charge. The former is a tenant's burden ; it is part of the produce of the land devoted to the use of the Church ; while the tithe-rent charge is a sum of money per annum payable in lieu of tithe, and charged on the land. Thus it becomes a tax, and a landlord's tax ; because it is almost like a mortgage, which must be borne by the owner, not the occupier. Where you find that the tithe has been commuted or compounded for, you may know that it is no longer a burden on you, but is a charge upon your landlord. The parson must put the landlord in the County Court for the sum he claims as his due.

I have dealt with agreements by the tenant to repair and to pay rates and taxes. These are not the only ones a householder may be called upon to make. It is not usual to insert any others than those I have already named in a weekly, monthly, or yearly tenancy, but in a three years' agreement, or a lease for a longer period, the tenant will frequently be asked to take upon himself the following liabilities :—

- (1) *To insure* the house against fire.
- (2) *Not to assign or sub-let* the house.
- (3) *To reside* on the premises.
- (4) *Not to carry on any trade or business* on the premises.

**To insure.**—The usual form of the agreement to insure is : The tenant will insure the premises in an insurance office to be approved by the landlord, to the full value of the premises, and will keep the same insured during the term of the lease, and if the house is burnt down or injured by fire, the money received from the insurance office shall be applied to rebuilding the house. At one time it was a common kind of fraud for a man to take a house, insure it, with a covenant to apply the money to rebuilding the house, and then, when he received the amount from the company, to put it in his pocket and disappear. A number of fires, too, occurred in a rather suspicious way. There was no actual evidence that the tenant had set the place on fire himself, and the insurance company could not make charges of arson without absolute legal proof. But still there seemed sometimes no other way of accounting for the outbreak of the fire. At last an Act of Parliament was passed, giving power to the owner to request the insurance office to lay out the money on rebuilding. The result is that the tenant does not receive any of the money himself. The office employs its own builders, and pays them directly. So that when a landlord has any suspicions he may, and often does, ask the insurance company not to pay the money to the tenant.

Sometimes, as I have noted on page 155, there is an agreement that the



lease shall be forfeited if the tenant breaks any of his undertakings. One of the most frequent cases of breach of agreement is in the case of insurance. The tenant forgets to pay the premium very often. To provide a means of finding out whether he has paid or not, the landlord stipulates that *he shall have the right to ask the householder to produce his receipt for the last payment*, and if the tenant cannot produce it, the landlord brings an action for the forfeiture of the lease. But he must give the tenant notice first, just as in the case of repairs. The law, however, is very chary of enforcing these forfeiture clauses, and if the tenant at any time before the action is tried (I mean, after it has been begun) will insure as he promised, and will pay the landlord's costs of the action up to date, the landlord will be obliged to drop the matter.

**Not to assign or sub-let the house.**—You will naturally ask what are "assign" and "sub-let." Many people do not know the difference. Suppose A has taken a house from X for twenty-one years from 1880, and in 1890 A wants to get rid of the house. He may want to leave that part of the country, perhaps, or the house is too big or too small for him. He accordingly makes over the remaining eleven years of his lease to B. This is assigning. *B must pay rent to X, and becomes X's tenant.*

But if A simply lets it to B for, say, five years, thus leaving himself with a substantial part of the lease still in hand, this is sub-letting. B pays rent to A, and A pays X. The difference between the two is, that in the one case A grants to B the whole of the remainder of the lease, and in the other, he only grants him part of it; so that *B is A's tenant*, not X's.

Now, landlords who grant long leases have a great objection to assignments and sub-leases to undesirable tenants, and it is only natural. The landlord says: "I let the house to you, because I knew you to be a man of good standing and character, who would take care of the place; but I do not want to have for a tenant Dick, Tom, or Harry, who may let the house go down and give me a lot of trouble and annoyance." Especially landlords do not care for their leases to be assigned to *limited companies*, because if one of these goes into liquidation the landlord cannot distrain for his rent. Therefore, almost all owners of property try to prevent assignment and sub-letting without leave. There are two ways of putting this clause. One is: **The tenant shall not assign or under-let.** The other is: **The tenant shall not assign or under-let without the leave of the landlord, which shall not be unreasonably withheld.**

I advise any householder whose landlord insists on such a clause to try to put in the second one. It makes all the difference. If you agree not to assign or sub-let at all, and your circumstances alter so that you want to remove, you are at your landlord's mercy. But if you add "*without consent, which shall not be unreasonably withheld*," you are safe enough. You have only to secure a respectable tenant in your place and submit his name to the landlord, and the landlord is bound to accept him. I once had to advise a man who had procured a perfectly substantial tenant—a Jew—and the landlord refused to accept his name. The reason was, that he (the landlord) "objected to Jews"! My advice was to the point. "Assign the lease to the Jew," I said, "and if your landlord"

has any complaint, let him bring his action. We will see whether her Majesty's judges consider this a reasonable objection to make." My advice was followed, but there was no action. The landlord's solicitors advised him that if he made an unreasonable objection to the proposed tenant, the assignment could take place notwithstanding such an objection.

A point sometimes arising when the tenant has agreed not to sub-let is this: *Can the tenant let lodgings* without breaking his agreement? The answer depends on the words of the agreement in question. If it is—"the tenant will not assign or sub-let *the house*," it is no breach of agreement to take lodgers. But if it runs—"the tenant will not assign or sub-let *the house or any part thereof*," no lodgers may be taken. Even then there is nothing to prevent you from taking boarders; but you must not have a lodger to whom you let the exclusive possession of one or more rooms. Letting a room is clearly letting "a part" of the house, and you must, therefore, be careful not to make an agreement not to sub-let "any part," if it is your intention to take in a lodger.

**Agreements by the tenant not to carry on trade or business in the house.**—In many residential districts, especially in London, it is very customary for landlords to insist on an undertaking by the tenant not to carry on business or trade in the house. In some cases the restriction only relates to particular trades or businesses, and in others it includes all trades and businesses whatever. When particular trades, etc., are prohibited by the agreement, there ought not to be much dispute. Thus, if the tenant agrees not to use the house as a shop, and he does so use it, the landlord simply goes straightway to a Chancery judge and gets an injunction, by which the shopkeeping will be summarily put an end to. He may also bring an action for damages, and if the lease contains a forfeiture clause, he may forfeit the lease, after first giving notice to the tenant to stop carrying on trade.

But the questions chiefly arise when the agreement is not to carry on *any* trade or business on the premises let. The judges have frequently been called upon to decide whether or no particular occupations are trades or businesses. It seems quite certain that all occupations by which a man earns his living are not trades, neither are they businesses. For instance, Sir Walter Besant is an author. Writing books is his means of earning a livelihood. And yet, if the lease of his house contains a covenant not to carry on a trade or business there, could you say he had broken his agreement by writing books in his study? Again, I am a barrister. My lease contains an agreement not to carry on any trade or business in my house. Yet I very often take briefs home with me, and look up points for use in Court on the morrow. And I should be very much surprised if my landlord, who knows these facts perfectly well, were to try to get an injunction to stop me. Probably neither my landlord nor Sir Walter Besant's would be mad enough to dream of bringing actions against us.

Where, then, are you going to draw the line? "Trade" you can understand; but the word "business" is so very wide. For instance, does a lodging-house keeper carry on a business at her house? Does a dentist, or a doctor, or a solicitor who receives clients at home in the evening after he has returned from the city office? If you say "Yes," then why do I not carry on a business when I bring



papers home at night? If you say "No," then why does a dancing-master who holds classes at his home? I want you to see the difficulty caused by people who use these indefinite words and phrases.

It has been decided that the following occupations are "trades or businesses"—

1. Keeping a school.
2. Keeping a dancing academy.
3. Keeping a school, not for the purpose of profit, but as a charity—that is, the scholars paying no fees. This seems an unusual construction of the words "trade or business," which generally mean some occupation carried on with a view to profit.
4. A paying hospital; also a hospital where the patients did not pay. Here, again, the Courts have laid down the principle that although the word "trade" refers to something done with a view to profit, the word "business" may include something done out of pure charity.

5. A home for working girls is, in this sense, a business. A house was let with an agreement not to carry on any trade or business there. The tenant made it over to a lady who started a home for working girls. This home was supported by outside contributions. There were sitting-rooms, bedrooms, and so on, of which the members had the use gratuitously. Various ladies gave their services as managers, and the whole institution was carried on entirely as a work of charity. Yet the Court of Appeal held that this was a "business," and issued an injunction commanding it to be stopped.

If you are asked to take a lease with a stipulation in it forbidding trade or business, you must take it to mean that the house is to be used as a private dwelling-house only; and though **an occasional act of trade or business will not break the agreement**, yet a carrying-on or **continuous use** of the house as a business place will render you liable to an action. Thus, if you are a dentist, you might perhaps receive a patient at intervals at that house; but you must not put up a plate, "Dentist," and receive patients there regularly. The same with a doctor, or an insurance agent, or an artist. The breach of covenant occurs when you have people calling at the house regularly for business purposes—that is, not as private guests.

**A frequent grievance.**—It very often happens that a tenant takes a house in what is called a "residential" neighbourhood, that is, a locality which is not given up mainly to the pursuit of business, and cheerfully enters upon an agreement not to carry on any business upon the premises. But before his lease is up, he finds that his landlord has let the house next door without any of the same restrictions to some new tenant who does carry on trade upon the premises. I have known men, usually calm and good-tempered, become perfectly furious on such occasions, and rush down to their lawyer's, breathing out vengeance against all concerned in this nefarious operation of "lowering the tone of the neighbourhood." The way the case is put is this: "I pay a rent which I certainly should not have agreed to pay if I had known the street was to be anything but purely residential. Moreover, I have stipulated with my landlord not to carry on business on the premises on the same understanding. Here am I unable to carry on any trade in my house, and at the same time the house next door is let for business purposes."

This may be so, and doubtless your annoyance is very great—though what harm it does you to have your neighbour put up a placard in the window, “Tailoring and dressmaking done here,” I cannot for the life of me conceive. **You have no remedy**, none whatever. I will tell you why. If you have a remedy, it must be either against your landlord or against your neighbour. It cannot be against your neighbour, because he has done nothing illegal in starting business next door to you (provided it is not an offensive trade, such as a chemical factory or a fried-fish shop). And it cannot be against your landlord. Not on the contract, because that is one simply binding *you* down not to carry on business in your house. It does not bind him not to let the house next door for business purposes. And not because he has broken the law of the land, because, I repeat, there is nothing unlawful in the trading being carried on next door to your lordship or ladyship.

If you want to make sure that the house next door shall not be let for purposes of trade, you must make that agreement with the landlord before you take your lease. You should agree with him that during the time of your tenancy he shall not let or cause to be let the house next door except as a private dwelling-house. As far as I know, that is the only proper way of preventing the annoyance mentioned. As I say, personally I do not see where the grievance comes in, but it seems to affect certain people with the most disagreeable sensations to live next door to a trade or business, however quietly and respectably carried on. They can secure their comfort and their exclusiveness only in the way I have described.

The remaining covenant to which I wish to refer is the one which provides that you shall **reside on the premises during the continuance of the lease**. Landlords like this stipulation to be entered into, because so long as the tenant lives in the house, there is less likelihood of the property being allowed to deteriorate. Moreover, there are likely to be some goods on the premises which can be seized for rent, if necessary. Now this agreement is very frequently misconstrued. Many tenants, and many landlords too, imagine that the tenant *himself* must live in the house the whole time. This is quite a mistake. Unless there is an agreement by a tenant not to assign or sub-let, there is no reason why he should not. So long as *somebody* resides on the premises, it is enough. That person may be the tenant, or his assignee, or his sub-tenant, and the landlord cannot complain.

Before quitting this subject of clauses in leases, let me say that I shall deal with those affecting shopkeepers and manufacturers under different headings. This part of *The Family Lawyer* is especially for the benefit of the ordinary *private* householder, and concerns his relations with his landlord.

**A tenant's right of way.**—When a landlord lets you a house and premises, he also grants to you all those rights of way over adjacent property belonging to him which are **necessary** for you to have, in order that you may use the place in a reasonable manner. You have always a right, as the old lawyers put it, to **a way to church and to market**. The character of the way will vary according to the character of the premises. As a rule, for instance, you have no right to the use of more than one road, which may be either to the back or front door. But I was concerned in a case once which shows that sometimes, though you may have a high-road



past your front door, you will also have the right to use a private road. In this case Mr. J. J. was a coster-greengrocer, who had a horse and cart with which he used to go on his rounds in the morning, returning late at night. He took a five years' lease of a house in the middle of a row—that is, the house had no vacant space at either side. In the front was a public street. At the back was a yard, with a good stable, and running along the rear of all the yards was a private road belonging to the landlord. It was not necessary to use the private road to get to my coster's house, but it was necessary to go along it to take a horse and cart to the stable. For, as I have stated, the house was in the middle of the row, and you could hardly be expected to take a horse and cart through the house. One night, when the festive coster came home rather late, he found at the end of the private road the first few rows of bricks of a newly-built wall. Said coster promptly backed his horse into the wall and knocked it down. Next night the structure was there again, and again the cart was backed, with the result as before. A third day the wall was put up, and a third night was knocked down. Then the landlord, whose wall it was, brought action against the coster to have him restrained from knocking down or otherwise interfering with the wall.

The landlord argued, or rather his counsel argued for him: "We never gave this man a right of way. By his lease we let to him a house and yard, but there is not a word there about a right to use a private road. This is not a road of necessity to church or market, for the front door opens on the public street." To this the coster's counsel replied: "It is true there is nothing in the lease about a right of way, but part of the premises let by your client to my client is a stable. The use of a stable is to keep a horse in. We cannot get to our stable to put the horse in without using the private road. When we agreed to take the house, we took it partly because it had a stable at the back, and there was a way to that stable along the private road. If you are allowed to close up this, you make the stable quite useless, and it would be a pretty state of things to let us a place, and then, by some action of yours, render it of no use for the purpose for which we hired it. Further," said the coster's counsel, "this is a way of necessity, because it is absolutely necessary to use it *in order to enjoy the premises in the state in which they were when you let them to us.*"

The latter arguments prevailed with the judge, and he decided in favour of the sturdy itinerant vendor of vegetables. I shall not easily forget the delight of that worthy when he knew the result of the case. He leaned over to his counsel, who was sitting in front, and in an audible undertone invited him to "have a wet." And he went along the corridors of the Law Courts loudly declaring that the judge was a "good old bloke, considerin' wot 'e 'as been brought up to."

#### TENANT'S FIXTURES

are a frequent source of controversy between landlord and tenant. We know that a tenant often puts up such things as cupboards, cornices, gas-brackets, and occasionally he may even seek to improve the appearance of the house by laying down tiled hearths in the place of the old-fashioned stone ones, or add to his comfort by removing the existing fire-grates and replacing

them with others which throw out greater heat. When a tenant does this sort of thing, it is the wisest plan to make an agreement with his landlord as to his (the tenant's) right to remove these things when he leaves the house. I will suppose, however, that you have already made some of the improvements which I have mentioned without any such agreement. You may discover, when you remove, that the landlord will object to your taking away some or all of the articles. Let us consider how far his rights extend, and what is your right to remove those things which you have bought and paid for.

In the first place, remember that I am here speaking simply of **the fixtures of an ordinary dwelling-house**, not of trade fixtures, nor of the fixtures brought on a farm or market-garden. These rest on quite a different footing from those of which I shall now treat.

You (the tenant) will naturally want to carry away everything you have bought, and the landlord will object (unless he be a considerate man) to your taking away any more than you have a legal right to. Those things which you are *entitled* to remove I will call **tenant's fixtures**. Those which you must leave behind, as belonging to the landlord, I will distinguish as **landlord's fixtures**.

**Tenant's fixtures** are those things which a tenant takes into the house, or fixes to it, *for ornament and convenience*, provided that the things are *not so fixed that you have to break or damage* any part of the house to take them away. So that anything affixed to the body of the house in a permanent sort of way is not a tenant's, but a landlord's fixture. For instance, if you put in a new stove, and leave it simply standing on the floor without any fixing into either floor or wall, it is a tenant's fixture. And it remains so even if you screw it in with screws that can be taken out without damaging the wall or floor. But if you fix the stove actually into the floor or into a wall, or cement it up so as to connect it with the chimney, or fix it in by bolts let into the chimney or floor, you cannot remove it.

It is not uncommon for a tenant of a country or suburban house to build a little conservatory. Unless some agreement is made as to its removal at the end of the tenancy, you ought to be careful *how* you build. A householder once built a little conservatory at the back of his house. The conservatory was so built that one of the walls of the house formed a wall of the conservatory, as I daresay you have often seen. That is, there was a three-sided structure of glass leaning on the back wall of the house. Thus, the back door and windows opened into this glasshouse. Moreover, there were iron bolts by which the conservatory was fixed to the house-wall. When the householder gave up his house he wanted to take away his conservatory, but the landlord refused to allow it to be done. An action was brought, and the judges held that from the way the glasshouse was built it had been made part of the landlord's premises. You see, it could not be taken away without unfixing the iron bolts, which were driven into the brickwork, and, consequently, to remove them would have been to damage [the landlord's property. If the tenant had been content to allow the greenhouse simply to *rest on the ground*, leaning against the wall, he could have taken it away.



So that one thing to be considered is, *in what way the fixture is affixed to the premises*. If it is let into the ground, or fixed into the floor or wall by iron bolts, or joined with cement, it will be a landlord's fixture. If, on the other hand, it merely rests on the ground, being kept in position by its own weight, or if it is simply fixed into the brick- or wood-work with a screw or two, it will be a tenant's fixture. Generally speaking, anything which a tenant can lift up or unscrew remains his property, and can be carried away by him. But if he has to dig up the ground, or chip out any mortar, or break anything in order to separate it from the land or building, he must leave it alone, for it belongs to the landlord.

A tenant who had built a verandah at his door, which verandah was supported on two posts let into the ground, was not allowed to remove it. The same decision was come to once in respect of an oven, which was fixed in the wall by cement. But hangings, tapestry, pier-glasses, cornices, Venetian blinds, cupboards fixed with holdfasts, bookcases resting on brackets and screwed to the wall, have always been allowed to be tenant's fixtures.

Again, an ornamental chimneypiece, if not fixed in by plaster or cement, is a tenant's fixture; but a chimneypiece which is not put in for ornament, but as part of the house—*e.g.* an iron or wooden one—is a landlord's fixture. This gives us the clue to the second principle upon which we are to act in deciding between the rights of landlord and tenant. A fixture put up by the tenant as an *ornament* or for extra *temporary* convenience is the tenant's. - Anything affixed to the house as a *permanent improvement* is the landlord's. Qualify this by the first principle—namely, that the tenant can never remove anything so as to damage the house or grounds—and you get as a result these working rules: (a) If the tenant brings into the house anything of an *ornamental* nature, or for extra convenience, he can take it away again, so long as in removing it he does no damage to the structure or the land; (b) If a thing belonging to the tenant is fixed *firmly* to the house or the soil, he cannot take it away, whether it is ornamental or not; (c) If a thing, though but slightly affixed, is of the nature of a *permanent* improvement to the house as a whole, it is the landlord's property, no matter how it came there.

**A THING WORTH KNOWING.**—When your tenancy is up, and you leave your house, **take all the tenant's fixtures with you**. If you don't, they become the property of the landlord. I have known people to leave such things as Venetian blinds, cornice-poles, stair-carpets, gas-brackets, and articles of that kind, in the house, on the chance of the next tenant buying them. Let me tell you that if you do this you run a very good chance of losing your property. In fact, by the strict rule of law you have lost it the minute you left the house. It has all become the landlord's property, and you cannot sell it to the new tenant, because it is not yours to sell. If you think those things are likely to be bought by an incoming tenant, either make your bargain with him *before* your agreement expires, or else ask the landlord's permission to leave them in the house. Then you will be all right.

Another thing **not known to everybody** is that you cannot compel the landlord to give you any compensation for fixtures which you have put up and are unable to take away. In the conservatory case, for instance, the tenant had

erected a valuable little structure. He could not take it away, because he had firmly fixed it to the house. Neither could he claim any compensation from the landlord for the improvement he had made. You cannot be too well aware that if you make permanent improvements to the house of which you are a tenant, you make them for the benefit of the house—that is, of the owner of the house. I mention this because I have been told of people who have tried to get compensation for such things, and have been astonished to learn that their claims were without foundation, and could not be supported in law.

One word more. If you want to add to the convenience of your dwelling by building a barn, shed, or conservatory, or by putting in a mantelpiece, fireplace, or anything else of considerable value, the safe thing to do is not to fix it at all. Let it simply rest on the ground, kept in position by its own weight. Cause the thing to be so constructed that it is heavy enough not to be easily knocked or blown down. There ought to be no difficulty about putting a little extra weight on. Then you will be quite independent of your landlord's goodwill, for if the thing is not fixed to the premises, no one can possibly contend that it has become the landlord's property.

**Just a word about trees and plants.**—If you happen to be the fortunate possessor of a garden (I am *not* alluding to a market-garden or nursery carried on as a trade), it is as well to know that at the end of your tenancy all the shrubs, trees and plants in the garden must be left there. I once knew a man who had planted two pear-trees in his garden. Just as they were developing and beginning to bear fruit, the tenant quarrelled with his landlord, who at the earliest opportunity gave him notice to quit. The tenant happened to tell me about this, and I remarked that it was a pity, as he would lose his beloved pear-trees. "What!" said my friend, "is it the law that I must leave my own trees behind to enrich that scoundrel of a landlord?" I replied that it certainly was the law. The next I heard of it was that my friend had been summoned in the County Court for damaging those trees. When he found he could not take the trees away, he had mauled them so badly with a hatchet as to render them quite useless. He did not know that whenever a tenant puts a tree, plant, or shrub in the ground, it becomes the absolute property of the landlord as soon as it takes root. It was, therefore, as bad for my friend to hack those pear-trees as it would have been for him to chop up the front door.

### IN SCOTLAND

the law is not very much different from that which obtains in England; but there are some points of difference. In the first place, I will consider

**The Form necessary for a Binding Lease.**—A letting for a year may be by word of mouth, without any writing or signed agreement at all. The vast majority of houses in Scotland are let on yearly tenancies, from Whitsunday to Whitsunday, or from Martinmas to Martinmas terms (pp. 170 and 174). Of course, a letting for less than a year may be by word of mouth also, but a lease for any longer period must be by writing. If you make a lease for *more* than a year, and make it (or try to make it) verbally, there is no contract, and if you do not take possession of the place, the landlord has no remedy at all. But if you go into



possession, it will have the effect of a lease for a year, and if after the end of that year you remain in possession with the permission of your landlord, you will be tenant for another year:—and so on from year to year, you having the option to go out, and the landlord having the right to turn you out at the end of any completed year of the tenancy. But on very rare occasions even a verbal agreement for a long lease will be binding on both landlord and tenant.

If a lease is in writing, it need not be in any special form. It will be enough if it describes the house, the rent, and the period for which it is granted.

I will grant you a lease of the house at No. 14, Sauchiehall Street, Edinburgh, two stairs up, now occupied by Mr. John Macpherson, for three years, from May 28th, 1896, at a rent of £60 a year.

(Signed) DOUGAL McDUGALL.

To Alexander Sanderson, Esquire.

This is quite sufficient to give Mr. Alexander Sanderson a three years' lease of the house, because it specified the house, the term, and the rent with reasonable certainty.

When I said just now that a verbal agreement for a lease of more than a year was of no effect, *except* when followed by possession which made it a lease for a year, I proceeded to remark that *in certain circumstances* such a verbal agreement would be allowed to stand. Let me now explain what these circumstances are. If you have taken a house for more than a year, especially for a long period—say, ten or twenty years—and have neglected to put the agreement in writing, and some of the terms of that agreement involved considerable outlay on your part, which outlay you have made, you can claim to have the agreement stand good. For instance, you agree, by word of mouth, to take a house for thirty years, and having gone into possession you have expended considerable sums on making the place to your liking. You would not have done this if you had merely been a tenant for a year. Your landlord knows you are spending this money on improvements, and he sits down and smokes his pipe in peace. Then when you have improved the place out of all knowledge, he comes at the end of the year and orders you out. You naturally refuse to go, and remind him that the agreement was for thirty years. To which he replies: "I know that; but it is not legal, because not in writing."

Obviously, this is a gross and immoral fraud on his part, and because it is a fraud the Courts will not let him have his way. If he meant to turn round in that way he ought not to have sat down quietly while you were spending your money. But if he knew not that you were incurring expense about the house, the case is entirely different. He can then turn you out. You see, the reason why the Court will not allow him to turn you out in the one case, though in the other it will, is not because of your expenditure, for that may be identical in both cases, but because of his fraud.

**Stamp Duty.**—As in England so in Scotland, leases and agreements for leases must be stamped with an Inland Revenue stamp, which varies according to two things—the length of the lease, and the rent. Indeed, the law of the two countries in this respect is identical, and you may take it as a rule that the revenue laws are the same for the whole of Great Britain.

1. For every £50 of rent, or fraction of £50,

Every lease for *35 years or less*, or for an indefinite time, pays 5s. ;  
Every lease for *over 35 and not more than 100 years* pays £1 10s. ;  
Every lease for *over 100 years* pays £3.

2. If the rent is £10 or less, **and** the tenancy is for a year or less than a year, only a penny stamp is required on the agreement. Remember that such an agreement need not be in writing at all.

**When the stamp must be put on.**—If you like you may purchase paper duly stamped, and write the lease on that. Or you may write on unstamped paper and have it stamped afterwards. The latter course is frequently adopted, because whoever writes out the document may very easily make blots or blunders, and spoil the paper. This does not spoil the stamp so far as to cause you to lose your money, because you can take the spoilt paper to an Inland Revenue office and they will give you another for it, or refund the money; but they generally put you to some trouble about it, *more suo*. “For ways that are dark, and for tricks that are vain,” commend me to the Inland Revenue official. It is possible to make him move, but you need not attempt to make him hurry. The Department is so constituted, in fact, that he cannot go fast if he would, and as he gets older he would not if he could. Therefore, the best way is to write your agreement on a blank paper, and take it to be stamped. And be sure you do so *within thirty days* after it has been signed, for if you delay over that time you will have to pay a penalty. My advice is—take it at once, while you remember it. The revenue is enriched by thousands of pounds a year collected from people who forget to stamp their agreements in time.

**Notice to Quit.**—In Scotland, as in England, a certain amount of notice is necessary before removing from a house, but the length of time is different in the two countries. For one thing, most Scottish burghs and other localities have their local customs, and these must be observed where they exist. But if there is no local custom in the place where you live, you must give or take at least forty days' warning to remove. This applies to tenants who hold tenancies by the year or half-year. Of course, it cannot apply to monthly or weekly tenancies. In the case of houses let to a tenant for **four months or less**, notice of removal must be given as many days before the date of removing as shall be equivalent to one-third of the lease. Suppose, that is, you have a tenancy for six weeks, you must give two weeks' notice to quit; if you hold by a monthly tenancy you will give ten days' notice; if by a weekly tenancy, three days. It is impossible to give exactly a third of a week's notice, so in that case you err on the right side by giving a little more rather than a little less.

**When you must leave.**—I cannot help thinking that the Scottish rule is more convenient in this respect than the law of South Britain. An English tenant, as I have told you, can claim to remain in possession of his tenement until midnight of term-day. Not so a Scotsman. He holds from noon of the 28th May or 28th November until noon of the same day in the following year. This is, as my Scottish experience has proved, a far more convenient plan than the English one. If you want to enter a house in Birmingham on Lady Day, when the bitter March winds make the ordinary discomforts of removal ten times more uncomfortable, you may be put to any amount of discomfort by the stupidity



of the man who is leaving the house on the same day. He is in no great hurry, not he, and perhaps he keeps you waiting there until ten o'clock at night. You ought to be thankful he does not make you wait until the clock strikes the "witching hour of night when graveyards yawn and ghosts troop forth." For by vacating possession at ten in the evening he is allowing you to enter two hours earlier than the law obliges him. In Glasgow, on the other hand, he would have to be out by twelve sharp, thus leaving you time to get at least one room in decent order before bedtime.

**The rent** of a Scottish householder is payable at Whitsuntide and Martinmas (11th Nov. and 15th May) if the lease is a yearly one, or if it is for a longer period. But this obligation may always be varied by the agreement between landlord and tenant. The legal term-days are only fixed by law to provide for those cases in which no specific arrangement is made. It will be quite legal for you to agree with your landlord to pay the rent once a year, or once a month, or once a quarter, on any day most convenient to you both. A monthly tenant must pay at the end of every month, and a weekly tenant every week.

**The landlord's security for his rent.**—An English landlord who lets a dwelling-house has the right to seize the goods on the premises if the rent is not paid (p. 142). There is a somewhat similar right on the part of a Scottish landlord, but the latter has a considerable advantage over his English brother. When a tenant hires a house in England, there is no obligation on him to furnish it. He may hire it for as long as he likes—ten years, let us say—and put in a three-legged stool only, or even less. The consequence is that the landlord's security for his rent may be little or nothing. But **a Scottish tenant of a dwelling-house is bound by law to furnish that house in a decent, respectable manner, having regard to the kind of house it is.**

Over all the furniture and household effects taken upon the house the landlord has a right which is called *Hypothec*, and it is this right I would discuss for a few moments. In the first place, I will answer the question: What goods come within this right? The answer is: Anything which is used as furniture, no matter to whom it belongs. Suppose you take furniture on hire even, the landlord has a right to it as security for his rent, though it is not your property. Suppose, again, a friend lends you some articles of furniture. These also the landlord may seize and hold as security for what is due to him. But he cannot claim any right over cash, or business books, or wearing apparel, or goods (even furniture) sent to you to be worked on in the way of your trade. If you are an upholsterer, and someone sends a chair to your private house for you to re-cover, the landlord cannot touch it, because it is not brought into the house to be *used as furniture* there.

In the second place, I would answer the question: What is *hypothec*? or, to put it another way: What is it, exactly, that the landlord can do with the furniture? The answer is, he has the right to go to the Sheriff's Court and obtain a sequestration order and warrant. By virtue of the warrant the landlord goes to the house, makes a list of the articles which he considers sufficient to satisfy his claim, and then has a roup or sale of them. After the landlord, or his factor or agent, has taken possession of any particular piece

of furniture, which is generally done by marking it in some way, the tenant is not allowed to sell it. Even if he does, the landlord can follow it and take it away from the buyer. Moreover, the tenant, by such sale, has rendered himself liable to imprisonment.

**You need not pay your rent** if the house should be burnt down, or blown down, or otherwise destroyed or damaged as to be uninhabitable. In this respect the Scots law is, I think, more reasonable than the English. The latter says: "You must go on paying rent until the end of your lease, unless your agreement with your landlord stipulates to the contrary. So that if you wish to be free of rent on the destruction of the house, make that proviso a part of the contract." The Scots law, on the other hand, says: "You agree to pay house-rent for a place to live in. If, through no fault of yours, the tenement becomes unfit to live in, your obligation ceases. You are not compelled to pay for what you cannot possibly enjoy." Remember, that if you, by your own neglect or folly, destroy or damage the house, and in that way it becomes uninhabitable, you must then pay rent all the same.

**The liability of landlord and tenant to repair the house** is another subject upon which the law of the two countries is radically different. In England, unless there is an agreement to the contrary, neither party is bound to repair. In Scotland a more practical and more sensible rule prevails. There are two ways in which a house may come into disrepair. One is by negligence or hard usage on the part of those who use it. The other arises, as Professor Bell puts it, "from the inevitable and imperceptible tendency of all the works of man to decay and destruction by use."

Now these two kinds of disrepair stand on quite a different footing, both in reason and in law. When a householder allows his family to knock the house about—little Jimmy tries the temper of his new knife on the doors and cupboards; little Donald scrapes the paint off with his boots; the householder himself drives long nails and screws into the plaster, endeavouring to hang his pictures—in all these cases of hard usage the householder must make good the damage. He is bound to repair those injuries before he leaves the house, and if he does not, he must not be surprised at being brought before a court of law and being ordered to make compensation in money.

On the other hand, all those dilapidations which come from tear and wear, from the ordinary and proper use of the house as a dwelling-house, are the landlord's burden. He must keep the place up so far. And should a storm or tempest, or other action of the elements, cause a slate to break loose or a chimney to collapse, the landlord can be compelled to put these matters in order. In short, all repairs must be done by the landlord, except those that are made necessary by the wasteful conduct of the householder and his family.

**Agreements to repair** are not usually entered into except where the lease is a long one. In such a case, however, it is not unusual for some arrangement to be come to. A common sort of agreement is for the tenant to agree to uphold the house and outbuildings—for example, stables, greenhouses, and other buildings apart from the house. The obligation cast upon you, if you do enter into such an arrangement, is to keep the place in the same kind of condition



as that in which it stood when you went into possession of it. If the house falls into a ruinous condition you must repair it, or even rebuild it if necessary, and the same with regard to the outbuildings. But you are not in any way bound to *improve* the house.

**Tenant's rights to compensation for improvements,** or meliorations, as they are called in law language (from *melior*, Latin, = better). Some householders there be who foolishly set to work to improve the property of their landlords. Foolishly, I say, because the landlords take all, but give nothing. The tenant may improve the place out of all knowledge, and raise its value a hundred per cent., but he is not entitled to charge the landlord with a single penny of the money spent. Many think this is hard, but in the circumstances, as the law favours the landlord and not what is equitable as between man and man, when you take a house in which you think there is room for improvement, and which you intend to improve, be very careful to make an agreement with the landlord that he is to allow you some or all of the money you spend—provided, of course, that the house is permanently improved by it.

**The householder's use of his house.**—If you hire a house as a dwelling-house you must use it for that purpose, and that alone. You may not, of your own will, turn it into a shop, or use it as a warehouse, or storehouse, or office, or for any other purpose whatever. This, again, is quite different from English law. An English landlord who objects to his tenant converting a dwelling-house into a shop, or workroom, or using it for a show-room, or the like, is obliged to protect himself by a special clause in the agreement of tenancy. Not so the Scottish landlord. The Scots law presumes that when you hire a dwelling-house, you mean to use it as such, and will not allow you to devote it to any other purpose. If you do, the landlord will be justified in bringing an action against you, and you will probably regret your attempt. Should you, therefore, design to use a house for some purpose other than that for which it is evidently intended, it is imperative to inform the landlord beforehand, and to abide by his decision.

**Assigning and sub-setting (or sub-letting)** are always legal, unless the tenant has agreed not to assign or sub-let, just as in England. When the householder, A, sub-lets his house to B, the latter becomes A's tenant, and has nothing to do with A's landlord unless A does not pay his rent. Now, as I said, the landlord of a Scottish tenement has the right of Hypothec over the furniture brought on the land, which furniture is the landlord's security for his rent. Suppose that A does not pay his landlord the rent, can the landlord come on the land and seize B's goods? This depends on the circumstance whether or no A's landlord agreed to allow A to sub-let to B. **If he did assent to the sub-letting,** and A gets behind with his rent, A's landlord may ask B to pay the rent to him instead of to A. So that it comes to this: if B has already paid his rent to his landlord, A, he is under no further liability whatever, and if he has not paid A, then he must pay A's landlord.

But it often happens that B, after paying his own rent to A, finds himself compelled, under stress of law, to pay A's rent to A's landlord also. I mean such a case as this: A rents a house from L at £25 a-year. A then sub-lets it to B at

£30. B pays his rent every half-year (£15) to A; A ought to pay £12 10s. to L. But instead of this, A puts the £15 in his pocket, and pays nothing to L. L can seize the goods of B, and, if B does not pay the £12 10s. which A owes, sells the goods to discharge the debt. Such a scandalous state of things can only occur when L did not assent to the sub-letting to B. It is, therefore, of the utmost importance to a householder to inquire, when he rents a house, whether the person from whom he takes it is the owner, or only a tenant. If he be the owner, well and good; but if he be only a tenant, you should never become his sub-tenant without the leave of his landlord. It does not matter if you take the house ready furnished; but you run a considerable risk by taking your own furniture into a house which you do not take from the owner. You can only be safe by applying for the owner's consent to the sub-tenancy. The moral is, therefore, that though a tenant may sub-let without the consent of his landlord, such a sub-letting without consent is not by any means safe for the sub-tenant.

Assignment is different from sub-letting, as an example will readily show. A hires a house from B for three years. At the end of one year he quits the house and lets it to B for, say, one year. B pays A the rent, and A pays his landlord. This is sub-letting. But if A sells or transfers his entire agreement to B, so that B stands in A's shoes and takes over A's responsibilities, B pays the rent to A's landlord. In fact, B becomes tenant to A's landlord, and not to A. This is an assignment. The result is that the landlord looks to B to perform all the obligations which A originally undertook, and if B does not pay the rent, his furniture may be seized and sold. B also becomes liable to do the repairs which A may have contracted to do, and, in fact, he *puts himself in A's place*.

**Tenant's fixtures.**—The law about tenant's fixtures is of far more importance to the Scottish householder than to the English. The Englishman on entering a new house always finds it fitted up with stoves, hearths and grates, sometimes with blinds, and often with other little conveniences. The Scottish householder takes his stoves, grates, and blinds with him when he moves, for his new domicile will consist of the four walls, with the shelves and presses as the only fixtures.

What I have said about furnishings put up in the house by the householder in England applies also to Scotland. Whatever the tenant affixes to the body of the house, he is entitled to take away, provided that he can do it without knocking the house about. Let me give an illustration: You put in your dining-room stove by simply standing it in the fireplace, without screwing, nailing, plastering or cementing it to any part of the wall or mantelpiece. You can take it away, because it is not a fixture at all. Again: You screw it to the wall to steady it. You can still take it away, because you can remove the screw without making any further hole in the wall. But if you fasten the grate in with cement, as English grates are generally fixed, you will have to leave it behind, for it has then become the property of the landlord.

Gas brackets and chandeliers simply screwed on can be removed; but the landlord can object to you taking away any that are joined to the gas-pipes by soldering them. The same kind of remarks applies to cornices and curtain poles. If these are nailed to the house, there they must remain; but if they are only screwed, or hung on brackets, they may be taken away. Generally speaking, you



are at liberty to carry away with you anything you have put up, if you have only screwed it to the permanent part of the house. If, on the other hand, you have fastened it with a nail (I don't mean just a tin-tack), you have practically given it to your landlord. As I say, I do not mean a mere case of tacking down a carpet, and such like. I mean actually nailing the article in question to the floor, or roof, or wall, so that you are obliged to remove the nail, and have a little difficulty in so doing, before you can remove the article.

This case has happened : A householder, by way of improving the appearance of his drawing-room, fitted up therein a large mirror panel. This panel was the whole height of the room, and about six feet wide—in fact, a very valuable ornament. The mirror was set up by means of driving plugs of wood into the wall, and then nailing the mirror to these plugs. The tenant who treated himself to all this gorgeousness found that he had to leave his looking-glass behind when he left the house.

**Take them away**, those fixtures of yours, on term day, or before it, for if you defer doing so you may not get another chance. Anything even slightly affixed to the house—by a screw, for instance—will become, in the eye of the law, permanently adhesive if you do not remove it when your time expires.

This little chat about fixtures has been for the sole benefit of a householder in the ordinary sense of the word. Farmers, manufacturers, and shopkeepers of all sorts have different rights with regard to fixtures erected by them in the way of business and trade. What those rights are I shall relate in the parts of this book dealing with farmers, manufacturers, and shopkeepers.

Let me further say, in reference to the Scots law upon the subject of the householder and his landlord, that the obligations, liabilities, and duties imposed by law may be altered by the particular agreement you choose to enter into. So that whenever you want to know what your rights and duties are, look well at the lease first. What I have written in this chapter is the general law of the country, which governs the relations of landlord and tenant unless these two have contracted differently.

For instance, it is quite competent for you to agree to pay your landlord his rent in advance, or you may agree to pay all the rates and taxes, and so on. There is practically no limit.

Another element may occur to vary the terms of the general law, and that is local custom. In some few parts of Scotland the term days are not November 11th and May 15th, but November 22nd and May 26th, called Old Term days. If that is so, then in the district where the custom exists that custom prevails. And so with any other well-established custom. But be this always borne in mind : If you want to shelter yourself behind any local usage, which is different from the general law of Scotland, you must be quite sure of your ground. It will not do merely to say that you have been a householder for so many years and have always done this or that. You must be prepared to prove that from time out of mind *all* the householders in your parish, or burgh, or city, or county have been in the habit of doing what you claim to be customary. "Custom makes law," is a maxim good all the world over ; but one man cannot make a custom, any more than one swallow can make a summer. There is nothing much more difficult to prove in a

Court of Law than a local custom. And rightly so. For such a custom is always set up in order to secure for the man who sets it up some advantage to which he is not entitled by the general law of the land. The judges will, therefore, require to be satisfied beyond a reasonable doubt of the existence of such a custom. They take up, in fact, a negative or doubting attitude, and you have to convince them somewhat against their will. Ask any advocate with but a few years' experience what sort of a task that is.

### Flats.

In Scotland most houses are let in flats, and when I have spoken of the householder I have included him who lives in a flat.

In England it is far otherwise. The position of the tenant of an English flat is, in law, half-way *between that of a lodger and a householder*. As regards his landlord, he is really in a more favourable position than the ordinary householder, for the latter has practically no rights unless he contracts for them.

**One advantage** possessed by the tenant of a flat is, that if his domicile be burnt down by an accidental fire, or otherwise destroyed, he need not continue to pay rent. As I have shown on a previous page, the ordinary householder must go on paying rent until the end of his agreed-upon period of tenancy, unless he has specially contracted himself out of that liability.

My experience of litigation between the landlords and tenants of flats shows me that most of the quarrels arise in reference to the staircase, hall, and passage-ways. I mean, of course, the staircase, hall, and passage-ways not exclusively belonging to the tenant, but used by all those who have flats in the building.

**The landlord's duty and liability to the tenant** in this respect are very small. In the first place, the tenant must accept the approaches to his flat as they were when he became tenant, so far as he could have discovered their condition. He cannot complain if he thereafter tumbles over a defective stair or slips through a hole in the passage, so long as the stair was defective or the hole was there when the tenancy began. As lawyers say, the landlord does not warrant (that is, bind himself) that the stairs, passages, etc., are sound. *Caveat locator*—Let the tenant beware. The more you study the law of landlord and tenant, the more you will find out that neither of them has very many rights or duties.

There was the case of a woman who rented a flat on the top storey of a building in London. In carrying upstairs some of her furniture, she put her foot in a hole and broke her ankle. In the circumstances it was not unnatural for her to send the doctor's bill to the landlord and request him to pay it, and also to ask him to make her some reasonable compensation for the pain and suffering she had undergone. I am not going to offer any opinion on the point whether the landlord was morally bound to meet the demand. Neither did he look at the question from that point of view. He simply called on his solicitor and inquired: "Am I bound to pay?" The solicitor considered the point for a short time, and then replied in the negative. Upon the landlord refusing to make compensation for the injury, the tenant brought an action. It was put for her in this way: "Mrs. Green is [not the tenant of the stairs; she has a right of way simply. We agree that if this had



been a stairway inside the house hired by her, she would have no claim at all. But there is a great difference. It is just as though I had the right to walk across your field, and you dig a hole in the path, into which I fall in the dark."

But the judges did not take that view. They said: "Here is a building in which some rooms are let to A, some to B, and some to C. They have a common stairway. In other words, the stairway is let to the three of them." It was held, therefore, that Mrs. Green was a tenant of the stairway jointly with the tenants of the other flats, and so the landlord was under no liability.

For that very reason **the landlord is not bound to repair the stairways, passages and halls** of a tenement composed of flats. He is not bound—that is, unless he has agreed with the tenant that he will do so. The best course for a householder who hires a flat to take is to be particularly careful what sort of an agreement he makes. I would never take a flat—except for a short period, as a monthly or quarterly tenancy—unless there was a clause in the contract compelling the landlord to repair those parts which all the tenants use in common. Such an agreement would run in this wise: "The landlord agrees to repair and keep in repair during the continuance of the tenancy all the stairways, steps, ways and passages used by the tenants of **Flatt Mansions** in common," or something to that effect.

#### TENEMENT HOUSES.

It frequently happens that with the growth of a town the well-to-do classes of the population are gradually driven outwards. As the trades and manufactures increase, those parts of the town which once were suburban become central, and the man who, twenty years ago, built for himself a house in a quiet spot in Green Lane finds one factory after another springing up around him, until the whole character of the neighbourhood has altered. Whereupon he removes to a more retired spot. What, now, is to become of his house? It will not let at a paying price, because it is too big for the neighbourhood. People who could afford to live there can afford to go to a pleasanter locality. The owner can, if he likes, pull down his house and erect cottages in its place, but it would be a pity to do that, because the fabric of the building is by no means worn out.

In such cases what is generally done is this: The big house is divided into sets of two or three rooms each, and these sets of rooms are let to people of the working classes, and such a house is then called a tenement house. You see, a tenement house differs from a building divided into flats in this respect: that flats are always built so as to be entirely separate, but tenement houses were originally built to be occupied as one dwelling.

*The law relating to tenement houses is practically the same as that relating to flats.* That is, the tenant is not obliged to go on paying rent if the house is burnt down or otherwise destroyed. As a rule, the tenants of tenement houses do not pay rates, but the landlord pays the local authority. If, however, the landlord neglects to pay, the rating authority may compel the tenant to do so, and the tenant can deduct the amount from the rent.

## CHAPTER II.

### THE HOUSEHOLDER AND HIS NEIGHBOUR.

What is a nuisance?—How to treat the neighbour—You cannot do as you like with your own—Carrying on a noxious trade—Character of the place—Noises—The steam merry-go-round—The quantity of the annoyance—You must not be faddy—Shaking houses—Authority of Parliament—The cattle-yard near the hotel—Fried-fish shops—Subsidence—Of buildings—Of land—The musical family next door—Poultry and the neighbour—The dog that barks—Interference with light—"Ancient lights"—Obstructing the view—Quarrels about water—Competition by a neighbour—Mischiefs by fire—The noisy crowd—Abating a nuisance—The overshadowing tree—Eaves-dropping—Wire fences—Dogs that bite—One bite but not one worry—Strange pets—Stealing dogs—Remedies for annoyance—Promptitude—Popular superstitions—Coming to a nuisance—The guileless cottager—"Trespassers will be prosecuted"—Whose leave you must get to make a nuisance—Flats—A bit about burglars—May you shoot a burglar?—"Beware of man-traps and spring-guns."

MY theme here will be of **nuisances and trespasses**. A nuisance is an interference with you in the comfortable enjoyment of your house and its adjuncts which is not a trespass. For instance, if my neighbour, Jones, walks on my land and plucks my flowers, that is a *trespass*. Or if he sends his dog there, or his sheep, it is a trespass, because he, or something under his control, comes *on* my land. But if Jones stops at home, and on his own side of the hedge proceeds to do something which annoys me and prevents me from enjoying the occupation of my house and garden with reasonable comfort and health, that is a *nuisance*.

There are people who think that the man next door is a nuisance, necessarily, and of himself. But these be grumpy folk, for whom the Sahara would be too populous and the mid-Pacific too lively. For such neither you nor I have any sympathy, I hope. The servant of the man next door strikes up a speedy acquaintance with your own domestic, and confidences are exchanged over the back wall what time the mats are being shaken in the morning, to the delay of your breakfast and the detriment of your matutinal temper. It is all very well for you to say, "Confound Jones's girl! Why can't Jones keep her from gossiping with Mary every morning, I wonder?" Probably Jones is "confounding" you with equal heartiness at the very same moment, and wondering why on earth you don't make your maid do her work instead of wasting his domestic's time in gossip. In this and various other ways you are both nuisances to one another, but social only, not legal nuisances. And it is to legal nuisances I would direct your attention.

To begin with, let me tell you how to act so as to incur no risk of having



an action brought by your neighbour against you. Do not run away with the idea that you can use your own house as you like. (I put on one side for the moment the rights of your own landlord. I will presume you have his leave to do any act of which I speak.) You can only use your house and land as you please within certain limits. And what are those limits? *Sic utere tuo ut alienum non lædas*, is the maxim set forth by a sage Roman lawyer—a maxim which lies at the basis not only of the law of Rome, but of Great Britain, and, indeed, of every civilised country. **So use your own that you do no injury to your neighbour.**

It is obvious that the law must impose some sort of restriction on the use of property. I have a hatchet. This hatchet I can lawfully use in a variety of ways. But I must not chop up my neighbour Smith's cart which stands in the street. You say at once, "Oh! I see that well enough. That would be wilful damage, and, of course, nobody is allowed to commit wilful damage." But why should I not do as I like with my own hatchet? The answer plainly is that you must not hurt your neighbour, whether with your own property or with any other person's property.

Let us take another case, not quite so obvious. I have a piece of land and a house. Adjoining my land is Smith's house. I dig in my own land, and by so digging I weaken the support of Smith's house so that it falls, or is so near falling that Smith has to prop it up. Smith asks me to desist from digging, but I answer, "Do you want to dictate to me whether I shall dig in my own land or no?" And I refuse to stop. You easily see that the question may be difficult to decide as to the equity of the case. I may be digging for coal, or gold, or copper, or to lay foundations for enlarging my own house, and it would be hard on me to make me stop and order me to fill the hole up, for it would be preventing me from using my land to the best advantage for myself. On the other hand, it is obviously quite as hard on Smith if I am allowed to go on.

The difference between this case and that of chopping up the cart is that here I am using my property for some substantial benefit to myself, while there I got no benefit at all. In both cases there is equal damage to Smith's property. Clearly such a matter requires careful consideration, and any hasty conclusions on the subject would be unwise. On the one hand, the owners and occupiers of houses and land must be allowed a reasonably free use of their property, and, on the other hand, you have to safeguard the interests of other people. Let us consider, therefore, in what ways it is prohibited for your neighbour to use his property (*i.e.* his house and land) so as to injure you. The first of these modes comes under the head of

**Carrying on a Noxious Trade.**—By *noxious* trade I mean any trade or business by which smells, unhealthy or unpleasant, or loud noises, or vast quantities of smoke or fumes arise and float over your house or garden. For instance, a chemical works next door will cause smells, a steel-plate works will cause continuous hammering, a brick-kiln will cause smoke. Or the nuisance may consist of shaking your house—as when your neighbour puts up machinery, the throb of which makes your house to shake. Have you any remedy? Can

you prevent him from exercising a lawful though, to you, an unpleasant calling on his own land? And the answer depends on three things:—

1. Does this trade **materially** interfere with the reasonably comfortable enjoyment of your house?

2. Has your neighbour obtained the **authority of Parliament** to carry on his business there?

3. In what kind of **locality** is your house?

I will deal with the third question first. A great deal depends on the **kind of locality** in which your house is situate. If it lies in a manufacturing part of a town where there are scores of factories and workshops carrying on noisy, dirty, and evil-smelling trades, obviously one addition to the fumes and dirt and noise will make little difference to the neighbourhood. I will give you an instance. If you have a house at Kensington and a tanner comes into the neighbourhood, buys ground, and sets up a tannery with all its odoriferous adjuncts, clearly that one tannery will make a great difference to you, because before that time there were no tanneries within miles of you. But if your house is in Bermondsey, a neighbourhood sown so thick with tanneries that the smells accessory to the making of leather are all over the parish, and you have already been living in the odour of tanning until your house is soaked with it—suppose, I say, that a new tanner sets up a few doors away from you. It is highly improbable that any extra smell caused by him would make an *appreciable* difference to you. The same thing would be said if a man in Bridgeton, Glasgow, complained of a steel-hammering shop. The reply would be, "My dear sir, there are a hundred hammering works within a radius of two hundred yards of this. How does mine hurt you?" The argument rests on this: that the neighbourhood is a manufacturing neighbourhood, and it stands, therefore, on an entirely different footing from a residential or wholly shopkeeping part.

But although the character of the neighbourhood makes some difference, because it makes a difference to the amount of damage, it cannot be said that your neighbour in a manufacturing locality has a right to cause *any* amount of smoke, noise, or smell that he likes. I will tell you what I mean. A farmer in the North of England, who lived in a district where chemical works were carried on, had three chemical factories on his borders, one on the east, one on the north, and one on the west. Then another factory was built on the south-east. The consequence was that noxious vapours floated over the farm, no matter from what quarter of the compass the wind was blowing. The vapour which came from the chimney of each factory was somewhat, though not very, deleterious to the crops; but the chemical matter deposited by the whole four formed a combination highly destructive to grass and corn. The farmer sued all four manufacturers and recovered damages from each one; though he could not have won unless each had been separately deleterious.

There was another case of a man whose house was next door to a shop. The shop was taken by a baker, who erected at the back an oven and bakehouse, where a huge pestle and mortar was kept pounding away for two or three nights a week. The sound could be distinctly heard in the house next door, and kept



people awake until the small hours of the morning. The householder obtained an injunction ordering the baker to stop the offensive noise.

A very common type of business offensive by reason of noise is that of a *public entertainment* or show. The kind of thing I mean may be illustrated by the **Steam Merry-go-round Case**. That was the case of a man who set up a steam merry-go-round in Epping Forest, a place much frequented by excursionists from London. The machine was kept at work all day and every day from spring to autumn. It had a musical *répertoire* of six music-hall tunes, ground out in remorseless and reiterative rotation from eleven in the morning to nine or ten at night. There were no houses in the immediate vicinity, but a man who resided about a quarter of a mile away complained of the ceaseless noise of the mechanical musician. The judge who tried the case came to the conclusion that the music was loud enough to be a *substantial* annoyance to the householder, and accordingly ordered it to be stopped. In this case the noise complained of could hardly be called music; but it would have made not the slightest difference had the splendid band of the Grenadier Guards been playing, instead of the steam hurdy-gurdy, so long as they were near enough to constitute a real annoyance. That this is so is proved by numbers of decided cases. Once a company started a skating-rink in London, and engaged a really good band to perform for about two hours, three times a day—making six hours of first-class music in the twenty-four. But the excellent quality of the performance did not prevent a householder whose premises were within about twenty yards of the skating-rink from obtaining an injunction to stop the performance. Six hours of brass and string band *per diem* was held to be a substantial annoyance, especially at such close range.

Now I will take the first point, which refers to the **materiality** or quantity of the nuisance. You can never complain of the way your neighbour carries on his trade unless it **substantially decreases the healthiness or comfort of your own house**. The law will take no notice of fads and fancies. I, for instance, do not like the smell of perfumes such as ladies use. Eau de Cologne, rose-water, musk, jockey club, frangipani, attar of roses, and all odours of that kind are disagreeable to me. But if a perfumer sets up a shop next door to my house, so that whenever a door or window is open I am saluted by a whiff of the scents I detest, I have no legal ground of complaint. It is mere fastidiousness on my part. There is nothing really noxious in the smell, nor would ninety-nine persons out of a hundred complain of it. And laws cannot be made to suit the whims of faddists. They must be enacted to fit the tastes and habits of the ninety-nine, and not of the one.

Again, a trade that is *merely offensive to the artistic eye* is not a noxious or offensive trade within the meaning of the law, because it creates no substantial discomfort. I might object to my next-door neighbour, or one on the other side of the way, setting up a cat's-meat shop. It is not pleasant to be obliged to cast your eye on cat's-meat; and in common parlance you would vote your neighbour a most unmitigated nuisance if he displayed horseflesh, and the parts of the deceased cow most in favour with tabbies, under your very eyes. But this, again, is mere fastidiousness, and you have no remedy.

A not infrequent subject of complaint is to be found in the huge hoardings

whereon advertisements are displayed. If your neighbour covers his house with advertising placards, or erects a hoarding in his front garden, you may not like it, but you must put up with it. Again I say, your house is none the less substantially comfortable. The air is just as pure, the light as good, the place is quite as healthy, notwithstanding the obnoxious bills and posters.

The only cases in which you can claim to stop your neighbour carrying on a trade is when that trade has one of the following effects:—

1. It causes a **smell**, disagreeable or unhealthy, or both.
2. It causes a **lot of smoke**, in such quantities as to blacken the clothes hung out to dry, or to destroy or injure your garden stuff, or materially to darken the house, or to cause a lot of extra cleaning, by which I mean that you hardly dare open a window for fear of the room being smothered with “blacks.”
3. It causes a **considerable noise**—like that, for instance, made by a steam-hammer—so that comfortable conversation becomes impossible or you are deprived of sleep.
4. It causes **fumes** (not ordinary smoke) that blight your flowers and trees and pollute the air that flows over your house.
5. It causes your house to **shake**.

At the risk of repeating myself, let me say that *you must not complain of slight or inconsiderable matters*. It is such a serious thing to interfere with a man who is carrying on a lawful trade that the Courts of Law are most unwilling to do it.

I have mentioned **shaking** as one of the nuisances of which you may complain in these days of railways, when, especially in large towns, there exist a great number of railway tunnels, very often underneath houses or quite close to the foundations, through which trains go rumbling along, causing the houses to be in a continual state of quake. It is usual, when railway companies are constructing tunnels or cuttings in close proximity to dwelling-houses, for them to settle a sum for compensation with the owner and the occupier. But if they do not do this, the householder has sometimes a right to proceed against them for nuisance. I say “sometimes,” because it may happen that the Parliamentary powers of the company exonerate them from all liability. If, for instance, the Act by which they were empowered to construct their line gives them power to run in that particular spot, you can, in that case, do nothing. You cannot fight an Act of Parliament, because the judges are bound to administer the law, and whatever Parliament passes is law. I mean that a Private Act of a railway company is just as binding as a Public Act which deals with a general subject.

But—and this is an important distinction—if the Act simply gave them power to construct a line from Birmingham to Warwick, and said nothing about the *route* by which they were to go, they must select such a way as will not cause a nuisance to anybody, *if there is such a way to be found*.

This kind of case, where a body constituted by Act of Parliament is empowered to do a thing, often gives rise to contests. For instance, the Metropolitan Asylums Board is empowered to build hospitals for infectious diseases—*e.g.* for the reception of people suffering from small-pox, fever, and the like. The Board built such a hospital adjoining the house and grounds of a gentleman named Hill. Mr. Hill objected to the hospital being put there at all. He



urged that the presence of so much infection was very likely to cause sickness in his household. To this the Board replied, "We have Parliamentary authority to build this place." Mr. Hill invoked the aid of her Majesty's judges, and what they said was this: "The Board are entitled—nay, are bound—to provide these hospitals. But they must not build them where they are a nuisance, unless they cannot get a place which would not be free from nuisance. They must, if they can, select a site where they will not injure anybody. If they are unable to find such a site, then they are entitled to build next door to Mr. Hill. The Board have not proved that it is impossible for them to find a place for the hospital where they will not be a nuisance to anybody, and therefore Mr. Hill must succeed in his action."

The principle is always the same. If Parliament passes a law telling a man he may do such a thing, and do it *in a particular way*, he may do it in that way, no matter what the consequences may be to other people. But if the law says that he may do such a thing, but *without saying how*, he must do it so that no one else is injured, if it is possible to do it without injury to others.

It is not always possible, as the following instance will show. The London and Brighton Railway had a station at Croydon, where they had a considerable cattle traffic. To facilitate this traffic they obtained Parliamentary power to purchase land and use it for a cattle-yard. This land was to be adjacent to the line, and within the borough of Croydon. The company decided on a plot of ground which was close to a hotel owned by a firm of brewers—Truman, Hanbury and Co. When the cattle-yard was in working order, the business of the hotel was most seriously interfered with. Cattle were lowing and sheep bleating all night long, and no wonder the manager of the hotel found his takings falling off. No one would have rooms at the hotel, because sleep was out of the question. Messrs. Truman, Hanbury and Co. felt themselves considerably aggrieved, and brought an action against the railway company. They met with this answer, which proved conclusive: "Parliament authorised us to construct a cattle-yard within certain limits. It was impossible to make one within those limits which would not have been a nuisance to somebody. You are the unfortunate victims." After an exhaustive inquiry the Courts upheld the railway company. It was true that nowhere in Croydon and adjacent to the line could they have found a piece of land suitable for a cattle-yard which would not have been offensive to somebody or other. It was hard on Messrs. Truman, Hanbury and Co., that the neighbourhood of their hotel should have been selected, but how could they be allowed to say to the railway company, "You ought not to have come and annoyed us; you ought to have planted your cattle-yard next door to Brown and Co., and annoyed them instead"?

It is impossible to give a list of offensive trades by which nuisance may be caused to neighbours. A very common one is **the fried-fish shop**, which is offensive by reason of the smell given off by the frying of fish in oil—often not very good oil. It is possible, I have heard, to carry on the fried-fish business so as not to be a nuisance, but cases have been frequent in which

damages have been recovered against the shopkeepers. I am entitled to have my house free from a frequent and unsavoury odour. If you want to set up a fried-fish shop next door to me, you will do well to come to me and inquire my views. I may be a person without any sense of smell, or I may be willing to put up with the unsavouriness for a consideration. But it will be dangerous to engage in the business without my consent.

So much for noxious, offensive, or noisy trades carried on by your neighbours. Now let me see what are the other grievances which you have against the person next door, or over the way, or underground, and consider which of them you are entitled to put a stop to, and which of them you must bear with what fortitude you may. There is our old friend

**Subsidence**, a grievance far more common in the North Midlands of England and in the Scottish mining counties than in purely agricultural districts. Most people know what subsidence is, but for the benefit of those who do not I will explain. When another man digs under your house so that your foundations are disturbed and your house sinks, or begins to lean to one side, or the foundations wholly or partly give way, that is subsidence. Generally it takes place when people are engaged in mining operations under the building in question, but it may happen in other ways. You know that *land leans on the neighbouring soil*. That is, if my land adjoins yours, your land leans on mine, and mine on yours. So that if I dig a deep trench or pit right on the edge of my land, some of yours will give way, and *vice versa*. The deeper I dig, the more your land will be loosened, and if there is a house on your land which adds to the weight of it, very little digging may cause your soil to give way to a serious extent, and may even loosen the foundations of your dwelling.

Subsidence cases are commonly fought very hard. The defendant is generally a colliery proprietor, who is charged with having scooped so much out of the bowels of the earth as to leave too thin a crust for the dwellers on the surface. I am told that in the county of Durham, where coal-mining has been carried on longer than in any other part of Britain, and where the ground is a perfect honeycomb, hardly an assize passes without at least one of these actions being brought. All kinds of defences are set up. The colliery people bring experts to say that the house which has suddenly cracked all up one side was badly built—so badly, that it cracked of its own accord. “Do you say that the fact of the mine passing underneath has nothing to do with it?” the plaintiff’s counsel asks. “Certainly I do,” replies the expert. But the difficulty always is to explain away the remarkable coincidence between the date of the fresh colliery workings and the date of the crack in the house.

What are your rights in this respect? In the first place, as to **land without buildings** on it, you are entitled to the same support from your neighbour’s land as Nature gave. In other words, if your land gives way by reason of your neighbour excavating his own ground, he must pay you damages.

The important case for the householder is, however, in connection with the **subsidence of buildings** owing to operations upon adjoining land or to mining operations under his own. What is your position with regard to that? You see



how different it is from the case of land in its natural state, unencumbered with buildings. Can I put on my land, at the extreme edge of it, any kind of a great house I like—a six- or seven-storeyed one, for instance—and then say to my neighbour: “You must not dig in your ground so as to disturb my fine house”? A very fair retort would be, I think, “You put your house there without consulting me. I want to build for myself, and shall have to dig for foundations. If I happen to disturb your mansion, I shall be sorry, but I cannot help it.” Now what are you going to do? Can you invoke the majesty of the law? Suppose your solicitor brought you down to my chambers to consult me on the matter, I should first ask how long your house had been built. If you told me for **forty years** or more, I should tell you that you had an absolute right to have it supported by your neighbour’s land, and should advise you to take action at once, as soon, that is, as your neighbour’s digging begins to be dangerous. If the house had been erected for **twenty years**, I should tell you that you *probably* had a right to stop your neighbour’s destructive delving; but if your house had **not** been erected for **twenty years** at least, I should say that you had no right at all. I am assuming all the way through that you or your landlord originally built the place without any agreement with your neighbour.

The principle is, that when you load land with the extra weight of buildings, you cannot, by your act, put your neighbour under any extra obligation. The law forbids him to take away the support from your land in its natural state, but that is all. In order to get a right for support to your buildings, there must be some agreement by him. This is obviously fair and just. So the best thing to do, if you want to build in the way I have described, is to agree with your neighbour on the question of support for the edifice. Perhaps for a small sum he will agree not to disturb your house by any operations on his soil. If he does so agree, take care you have it in writing, signed by him, and be sure to have a sixpenny Inland Revenue stamp on it. ’Tis better still to have it by deed, which you should ask a solicitor to draw up for you.

If you do not agree with your neighbour beforehand, you may acquire the right of support for your house by the lapse of time. *In twenty years you will have the right, in all probability.* It depends, not on anything you may do, but on the fact of who, during the twenty years, is the owner of the neighbouring ground. If, during that space of time the owner (not occupier) is a person of full age, and not a lunatic, you will have acquired the right of support. The reason is, because if you have undisturbed use of the right for so long a time, it is presumed that you had the right itself. But if the owner of that land during any part of the twenty years was a lunatic or an infant, who is incapable in law of giving you the right, the presumption does not apply. If I exercise a right over my neighbour’s land for twenty years, and he has never stopped me, it is fair to infer that he agreed to let me exercise the right. But if he is mentally incapable of agreeing, either from infancy or derangement of the mind, you cannot infer that he agreed. I hope I make this clear.

But because it is safer and more for the public good that there should be an end of lawsuits somewhere, the Legislature has enacted that at the end of forty years’ time your right to support shall become impregnable.

Akin to right of support from your neighbour's soil is the **right to support from your neighbour's wall**. I mean this kind of thing: A man has built two houses together, as houses stand in a row, with one leaning against the other. He sells one to Jones and lets the other to you. In course of time Jones wishes to pull down his house and to build a better one on the same site. To do so may, and in all probability will, seriously endanger your dwelling; for as soon as his house is taken away, your side wall will bulge out, if it does not altogether give way. You cannot prevent him from pulling his own house down, but you can prevent him from carrying on his operations so as to damage you. If he be a wise, not to say a neighbourly, man, he will take care to shore up your wall so as to give it support until the new building is properly put up, and that is his legal duty. Should he fail to carry it out, your only remedy is to apply to the Chancery Division (in England), or the Court of Session (in Scotland), for an injunction or interdict to compel him to do his duty, and for compensation for any injury actually sustained by you.

In most towns, cities, and boroughs, there are rules made by the Town Council or other local governing body to provide for this state of things. By these building regulations, all persons who propose to pull down a building in such a way as to leave an adjacent edifice without proper support, are bound to supply some means of support. To neglect to comply with this bye-law is an offence rendering the offender liable to a fine by a petty magistrate's court. It is generally effective, therefore, to write a letter of complaint to the Borough Surveyor when your neighbour proposes to act in the way described. That official will, as a rule, be able to take steps to protect you, without putting you to the expense of a lawsuit.

**Noises** are another variety of unneighbourly act which one often has to complain of. I mean noises quite apart from any business or trade. Whoever has lived in a terrace, or a semi-detached villa, separated from his neighbour by a wall only one brick thick, knows full well the pleasures of residing next door to a musical family. Miss Fanny practises on the piano for three mortal hours in the morning. No sooner does the echo of her last scale die away than you hear the wheezy tones of Master Johnny's violin. To him succeeds Miss Angelina, whose voice must be kept in training for the penny concert or musical *soirée* of the immediate and the operatic stage of the more distant future. Then about three or four evenings a week they have a grand *ensemble*, either for the amusement of their musical friends or their own peculiar delectation. It is difficult, even if you have a passion for music yourself, to keep up friendly relations with a musical family next door.

Let me say at the outset that you cannot entirely restrain Miss Fanny and her brothers and sisters from exercising their musical abilities. On the other hand, they have no right to render your house practically uninhabitable, and you will be assisted by the law if they, by their continued noise, render your dwelling **so uncomfortable that no ordinary, reasonable person would like to live there**. That is the law on the subject; but it is obvious that each case of this kind must depend on its own particular facts, for it must always be a question of fact to decide whether the amount of noise made by your musical neighbours is such as to make your house permanently uncomfortable. An occasional visitation



of sweet sounds you must not complain of. There is no law to compel Mrs. Leo Hunter to discontinue her musical At Homes which she holds every Tuesday. They annoy you and me, who live on either side of her ; but for a noise to be a nuisance such as the judges will interfere with, it must be almost continuous, loud, and unusual. So that if Mrs. Leo Hunter holds three musical At Homes every week for a month, you and I, her luckless neighbours, have a right to stop her.

There was a musical family in South London a few years ago who entertained friends three or four times a week for about three weeks, and kept it up until "the wee short hour ayont the twal'." A neighbour objected, and sent a note round begging that the parties might be discontinued. To this an answer was sent as follows : "Music hath charms to soothe the savage breast." But the neighbour, who thought he had not a savage breast, applied to the Court of Chancery for an injunction, and the meetings of this informal Orpheus Society came to a summary end. In addition, they had to pay two or three hundred pounds by way of costs (*Scotice*, expenses).

But the musical neighbour is not the only terror of modern life. There is the neighbour who keeps poultry which crows and cackles at unearthly hours of the morning, and the man who owns a dog which, being fastened in the back yard on a chain, most hideously bays the moon the whole night through. Here, again, you are powerless to interfere if the noises are only occasional ; but if they go on every morning or every night, or several nights or mornings in the week, for several weeks continuously, you may have redress. "What !" says the man with the dog, "may I not keep a dog ?" And the judge will say, "Certainly, my dear sir. Nobody asks you to sell or shoot your faithful hound. But you must not allow your dog to keep Mr. Smith awake all night and every night, or even two nights a week. Take the animal indoors at night, and then he won't howl ; or do something to stop his howling. The great point is that Mr. Smith must not be deprived of his natural and lawful slumber." And the same with the cocks and hens. A town is not a proper place to keep them, to begin with. And if any town-dweller will persist in keeping them, he must at his peril see to it that [they do not interfere with the reasonable amount of comfort which his neighbours are entitled to.

While I am on the subject of poultry and the neighbour, let me expound the law on a **matter of common occurrence**. I mean this : Robinson, next door, keeps fowls. You keep a flower garden, the which, in springtime, you sow with seeds and plant with bulbs. Robinson's hens fly over the wall and investigate, with the result that your seeds are scratched up, your bulbs are pecked to pieces, and the neat, orderly appearance of your garden is totally destroyed. You call on Robinson, and more or less politely inform him of the facts. He does not receive your complaint, perhaps, with the gravity becoming to the situation. He may go so far as to suggest that a few shillings will set the matter right—you had better buy some more seeds and bulbs and plant your garden again. Meanwhile he (Robinson) will do his utmost to keep his cocks and hens within due bounds. But you know what fowls are. They will break loose sometimes.

Now, you may object to be treated thus cavalierly, and you say so. And finally a stormy interview, such as is not uncommon between the man who gardens and his neighbour who cultivates poultry, ends with a threat on your part that if you catch his condemned hens on your land again, you will — ! You do not say what you will do, partly relying on the terrors of a vague threat of that kind, and partly because you do not know how far you may legally go. You would like to shoot the poor creatures. I have read of a man who caught and wrung the necks of as many as a dozen cocks and hens, tied on each of them a card, "With Mr. Blank's compliments," and threw them over into their proprietor's garden.

Now, to a lawyer, such a proceeding is so obviously illegal that he can hardly imagine any sane man supposing that he would be held justified in it. But it is an idea common enough among persons well-informed on most matters that, if they catch fowls, cats, dogs, tame pigeons, and such-like creatures damaging their gardens, they are quite at liberty to kill them. Other people think this course to be unlawful unless they have first given their neighbour warning of their intention. Both these ideas are entirely without foundation. You must not shoot or otherwise destroy your neighbour's live stock except in self-defence—as, for instance, a dog that attempts to bite you. Think, for the moment, of the dreadful consequences if the law were otherwise. For if you may shoot a trespassing hen, why not a trespassing cow or horse? If you look at it in that way, you will see the case in its true light. A hen—a prize hen of a rare breed, for instance—might be just as valuable as an old, knock-kneed, broken-winded horse. Yet many people would shoot the hen at sight if they caught it trespassing in the flower-beds in search of food, while no one, or, at least, no one whom I ever met, would dream of killing the horse if it strayed in at the gate and began cropping the grass. At the same time, both the animals are alike trespassing, and both doing damage to your garden.

It is also illegal, nay, even criminal, to lay down poisoned meat or other food on your own premises, with intent to poison stray dogs, cats, and the like.

Have you, then, no remedy? I reply: Certainly you have. You can drive the fowls, etc., away, and bring an action for damages for the value of the things destroyed and for the trespass. You can also take the law into your own hands to a certain extent by **capturing the animals** found committing damage, and keeping them until the owner pays for the injury they have done. While you hold them in durance vile, you must give them sufficient food and water, and you are entitled to *keep anything produced by them*. For instance, if you capture a hen, and it lays an egg during its captivity, you are entitled to the egg. But you must not sell the hen on any account. In the same way you must feed and milk a cow, and you may have the milk for your trouble. If you capture a horse, you must feed it, but you are not allowed to use it—as, for instance, to take a ride on it.

#### INTERFERENCE WITH LIGHT.

What are called rights of light, or **ancient lights**, form a frequent bone of contention between neighbours. These rights come in question in this



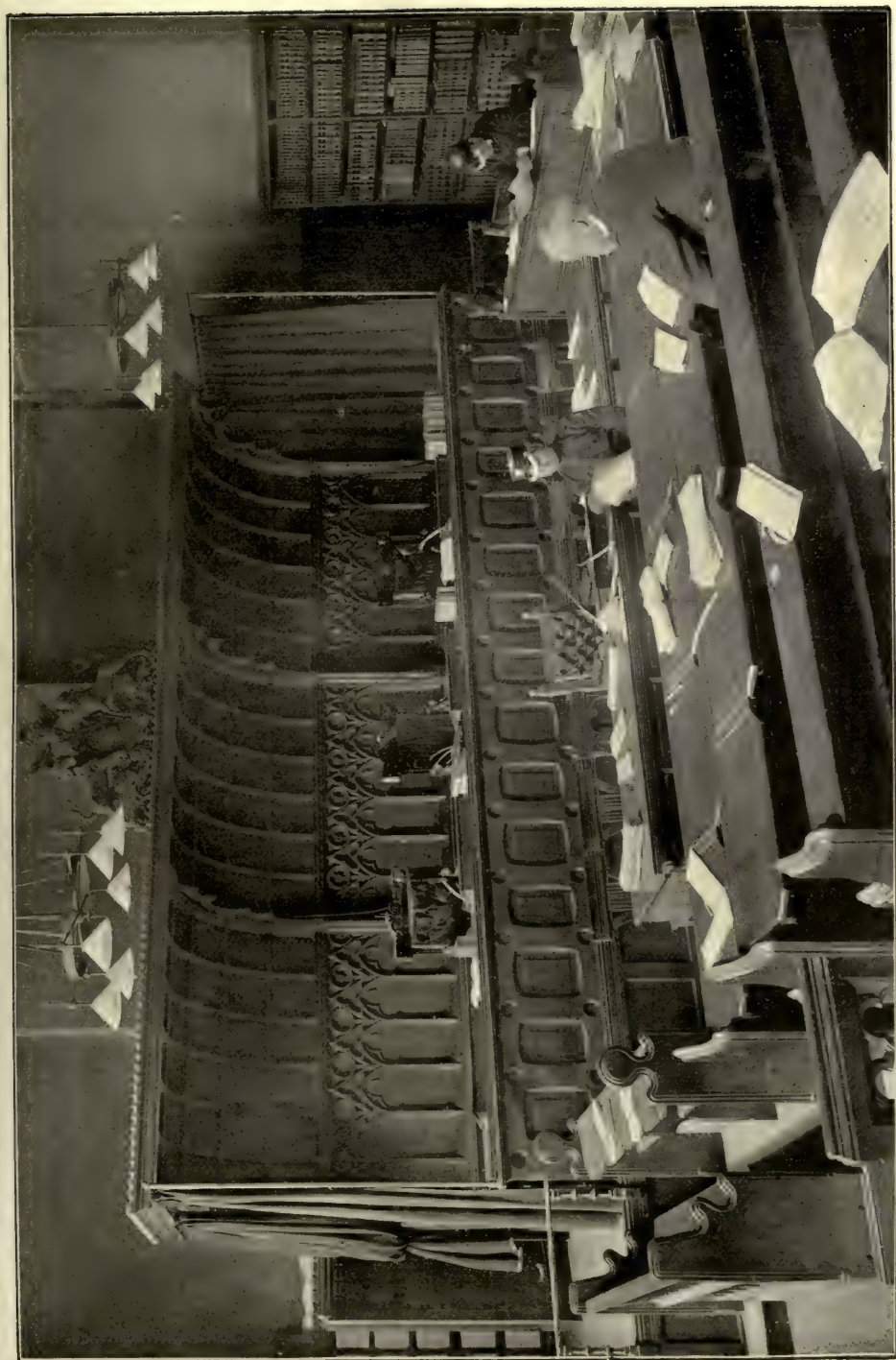
kind of way: Your back windows open on your neighbour's land, and he, in erecting a wall or other building, darkens your dwelling by intercepting the light which would otherwise come to your back windows. How far can you object to this? Let me say at once that you have no natural right to light for your house. You can only gain such a right *by agreement with or purchase from your neighbour, or by the lapse of time*, in the same way that you can claim support for your buildings from your neighbour's land.

In deciding how far you can object to this darkening of your lights, you should first ask this question: **Did the owner of my house ever have granted to him, by the owner of the adjoining land, a right of light?** Let me show you what I mean. When your landlord built that house he knew, or ought to have known, that the back windows were in such a position that they were liable at any time to be darkened by the erection of a high wall or other structure on the adjacent plot. He ought, as a prudent man, to have gone to the owner of that adjacent plot and made a bargain like this: "I will give you so much if you will agree not to build so as to diminish the light of the house I propose to build." If the neighbouring landowner agreed, then he would have signed, sealed, and delivered to your landlord a deed by which he gave a right of light for, say, six windows in such and such positions.

When you find your windows darkened, or about to be darkened by your neighbour, the first thing to do is to consult your landlord and ask him if any such right of light was ever given. If "Yes," then your position is the strongest possible. You can insist on your neighbour stopping his building operations, and if he refuses to stop, you can apply to the Chancery Court for an injunction to compel him to desist.

Suppose there was no such agreement between the two landowners, such as I have described, the next question to be asked is: **How long have those windows been there?** If they have been there without being darkened for **twenty years**, you have an absolute right to the light, and can prevent your neighbour from obscuring it. But if there was no express grant of a right of light, and less than twenty years have expired since the windows were put there, you are quite helpless to prevent your light from being cut off.

Some nice points arise on this question of rights of light. One is: Suppose I have had a *small* window, two feet by three, in a particular spot for twenty years, and I enlarge the window, making it five feet by eight, can I claim the light for the *big* window, seeing that I had it for the little one? I have put this question to many people (not lawyers), and they have all answered incorrectly. Some say: "The right of light is gone altogether, because the window which had the right is gone. This is a different one." Others say: "Yes; you have a right to light for your big window, because it is in the same place as the little one was." Now, let us see the truth of the matter, which is simple enough. I have exactly the same right, no more and no less than I had before. And what was that? It was to have uninterruptedly the rays of light which would naturally fall on a certain space measuring two feet by three. I have still the right to the light upon that identical area, and no other. If my neighbour obstructs that light, I can "have the law of him," but if he interrupts



THE COURT OF APPEAL, ROYAL COURTS OF JUSTICE.

[Photo: Cassell & Co., Ltd.]





other rays which would not fall on that particular area, I can do nothing. Another point is, if you have acquired rights of light in respect of certain windows, and then you pull the house down, do you lose your rights? Perhaps some reader will ask, "What do you want with rights of light if there is no house?" For this reason: you may want to build another house in its place, and use the rights for that. It is easy to see that if you are obliged to start afresh every time you may have to build, your position is not enviable. Let me ease your mind by saying that if you have a right of light for a particular window, you can only lose that right by abandoning it, even if for a hundred years the window is built up, or the house is pulled down. You may abandon your right if you like, and the Courts will often infer that you *intend to abandon it* from the mere fact that for a long time you have not used it. For instance, you have a right of light, twenty years old, for a window in your second-floor back bedroom. Then, to suit your own convenience, you board the window up. This does not give your neighbour a right to obstruct the light where the window used to be. But if you keep the window boarded up for years, and allow your neighbour to erect a building close up on that side without giving him any notice of your claim, you will be presumed to have abandoned the right of light for that window. Most Londoners have seen boards, bearing the legend "**Ancient Lights,**" hung upon the outer walls of houses in the City. This announcement, mysterious to many, simply means that in the place where the board now is there used to be a window, in respect of which the owner had a right of light, and the board is placed there with that inscription upon it to warn all and sundry neighbours not to build so as to obstruct the light which falls upon that space, because the owner may want to insert a window there again at some future time.

When you or your landlord purchase a right of light from the landlord next door, or by twenty years' enjoyment of uninterrupted light have gained an ancient light, what is it that you have got? **How much light are you entitled to?** The answer to this question is easy enough in theory, but not quite so simple when it comes to practice. The law is that you are entitled to have falling upon the window in question light enough for all practical purposes. In other words, you cannot complain of some interception of the sun's bright rays. You can only grumble loud enough for the law to hear when there is such a *substantial* diminution of light as to interfere with the use of that room for such purposes as you were accustomed to use it. This, I know, looks rather vague. Now for the application thereof.

If the window is that of your drawing-room, where you do not carry on any business, which you do not use to write in, the law will not assist you so long as there remains a reasonably sufficient amount of light to enable you to use your drawing-room with average comfort. You may be a man with a passion for light. You may object to being deprived of a single ray of it. The law will not help you there. But if your wife is in the habit of sewing in that room, and she has to curtail her labours because the light fails earlier than it used to do, that is a substantial interference with your right of light, and you do well to complain.



The room may, however, be used for a purpose which requires an absolutely undiminished flow of light, and in that case you can complain of the least obstruction. For instance, you may be an artist, amateur or professional, habitually using the room as a studio. Or you may be a photographer, using the camera either for amusement or a means of livelihood, with this room in which you carry on your operations. If your neighbour interferes with the light to such an extent as to hinder you in your work, you may bring an action against him. Of course, this is only where you have such a right of light as I have described in the early part of this section. To sum up, what is interference with such a right depends on the amount of obstruction, having regard to the particular use to which the particular room is devoted.

**Obstructing the View.**—There is nothing very much more annoying than to hire a house with a particularly fine view, and then to find, a short time afterwards, some enterprising builder running up a row of houses that will entirely obscure the charming prospect. Worse still, perhaps, is it if the obstruction takes the form of one of those gigantic hoardings devoted to extolling the extraordinary efficacy of Thingamy's Pills and the unrivalled cleansing properties of So-and-So's Soap. But be the obstruction what it may, you object to the curtailment of your outlook, and will be glad to know what your legal remedy is. Much as I sympathise with you, I must tell you that **you have no legal remedy whatever.** There is no such thing known to the law as the right to a view or prospect, and though your house without the view may not be worth half the rent you have agreed to pay, you must sit down quietly and bear it with what fortitude you are capable of.

### QUARRELS ABOUT WATER.

In country places it frequently happens that quarrels arise about water. The common sort of case is that A has a stream, or brook, or burn, *running* through his land. Someone higher up the stream builds a mill, or dye-works, or something of the kind, and empties his refuse into the water. A does not like this, because, instead of a purling brook, he finds only a foul and inky stream running through his field or garden. Has A any remedy? or, to put it another way, has he any right to demand that his brook shall be left in its pristine purity? The answer is that he has such a right, and, therefore, that he has a remedy.

The state of the law is this: every owner of land on the bank of a stream has the right to require that the water shall be left in its *natural purity*. There are only two ways in which he can be deprived of that right. One is by expressly giving it up, as, for instance, if A agrees that in consideration for a sum of money, he will not complain if B pollutes the water. The other is by allowing the nuisance to continue for twenty years without taking steps to stop it. What are the steps which A ought to take in order to assert his right? He can, of course, go to see his neighbour, or write to him requesting that in future no more dirt shall be poured into the stream. And if this is not effectual he can speedily put a stop to the annoyance by the help of the Courts. The High Court of Justice in England, and the Court of Session in Scotland, will issue a decree ordering the wrong-doer to cease his wrong-doing. In addition to this, if any actual damage

has been done, as, for instance, by the poisoning of fish or ducks, A has a right to be compensated.

The owner of land on the bank of a stream is always considered to be the owner of the stream itself as far as the middle of it. Thus, if he owns both banks he will own the whole stream between those banks. Not only has such an owner the right to prevent the water from being polluted, but also the right to *prevent it from being diminished*. To take an instance: it is common enough for someone who wants to use the stream as water power to construct a dam. The effect of this erection is to stop the water, or a considerable part of it, flowing down stream in its natural course. Now every river-owner lower down the stream can complain of this, and can bring an action against the man who put up the dam. The remark that I made about river pollution applies also to the case of obstruction, namely, that if the people lower down the stream give permission for the dam to be erected, or if they allow it to go on for twenty years without bringing an action to stop it, they cannot afterwards complain of the obstruction.

So much for streams of water. Now, let us consider a little bit

**About Wells.**—There was a man who lived at Croydon, and in his land he had a well. This well was supplied, as wells usually are, I believe, by the water which percolated through the soil. Understand, there was no *regular* stream flowing in a well-defined underground channel, but merely water *trickling* through the gravel. For two or three hundred years had this water supply been in existence, when a man who bought the adjoining piece of ground also sunk a well, much deeper than his neighbour's. The result was that the first well became dry, because the water which formerly trickled into it, now ran into the deeper hole.

As may be imagined, the owner of the old well was anything but pleased. He had an idea that he had some kind of right of property in the water which for so many years had percolated to his well. And certainly, if you regard the principle that length of enjoyment gives a right, you must admit that there was some amount of reason in the claim. It might be argued, and, in fact, was argued thus: If I have a stream running through my land, I have the right to stop anyone from diminishing the natural flow of water in that stream. Therefore, if I have a well, I ought to have the right to prevent anyone from diminishing the flow of water into the well.

This argument is like some of the cheap and nasty furniture that you sometimes see—very good to look at from a distance, but soon perceived to be full of flaws if closely examined. For, in the first place, the stream is *naturally* part of your land. The well is not: it is *purely artificial*. In the second place, a stream runs in a well-defined course and channel, while the water that percolates through the earth into a well comes in dribblets—as the popular saying is, “from nobody knows where.” So that, you see, the cases are altogether different.

But the soundest argument in favour of the first well is this: Here I have had a well for a great deal longer than twenty years, which well has been fed by water running from your soil. You cannot, after so long a period, do anything which will interfere with the comfort I have so long enjoyed, because, as a general rule, length of enjoyment confers right to enjoy. Such, for example, is the case of



ancient lights, where a man whose window has been unobstructed for twenty years gets a right that it shall for ever remain unobstructed.

This argument, I say, is sounder than any other ; but it is not sound enough, and I will tell you why. The reason why a man who has enjoyed a right of way or a right of light for twenty years is able to go on enjoying it, is because when I have done something for so long a time, the presumption is that I had a right to do it. Why? Because you saw me enjoying that right, and might have stopped me if I was wrong, and *you didn't stop me*. But it is far otherwise with the trickling of water into a well. In the first place, how was I to know that you had a well? I had no right to come on your ground and look. And if I did know you had a well, how was I to know that it was fed from the water percolating through my land? It would, in fact, be quite impossible to tell, except by making a well in my own land. It is because the trickling or percolation of water into a well is a thing which cannot be traced with anything like certainty, that mere length of enjoyment does not confer a right to it.

And so the man of Croydon who had the old well found himself without any remedy whatsoever, and, so far as I know, his ancient water-supply is to this day as dry as a lime-kiln. It was doubtless a hard thing for him, because it depreciated the value of his property ; but the Court was obliged, with many expressions of regret, to decline to help him. It was one of those cases where the decision was bound to be hard, whichever way it went, because in the one case the old well would be rendered valueless, and in the other, the neighbour would have been stopped from making the most of his own property.

**Competition.**—There are many cases analogous. Tuck, for instance, has a flourishing baker's shop, and has just worked up a comfortable trade when Bunn appears, and starts in the same line on the other side of the street. This will, very likely, damage Tuck, but the law cannot possibly assist him to shut up his rival's shop. I daresay most of my readers think this an obvious truth. "Whoever heard of one tradesman being able to prevent another from starting an opposition shop?" I fancy I hear somebody say, "Does the *Family Lawyer* think that we are so ignorant as not to know that such a thing is impossible?"

"Fair and softly," saith the Spaniard. It is not so very long ago that one schoolmaster brought an action against another, because after the first pedagogue had established a school in a certain village, at which school all the village boys learned the three R's and other rudiments of sound learning, the second schoolmaster appeared on the scene. He taught more rudiments than the first, and, as the first one alleged, "seduced" the boys to the seminary of the newer learning, "with intent to injure the plaintiff." And the case was solemnly tried, and the judges dismissed it after much learned argument, holding that trade rivalry was no offence at law.

There was another case, within the last ten years or so, where a steamship company brought an action against about half a dozen other shipowners, because the latter, wishing to keep up prices in a certain trade, combined to knock-out all rivals. The plaintiff, known as the Mogul Steamship Company, tried to run counter to the combination. The result was war to the knife, and the syndicate or combination began to undersell the Mogul Company and to do everything

possible to cut them out of the trade. Eventually the Mogul Company was ruined; but the Courts of Law decided that this was merely trade rivalry, and they could not interfere.

This, perhaps, does not immediately concern the householder and his neighbour. But I want to point out and to make clear that the law cannot always help you just because your neighbour is doing something which happens to hurt you. To interfere might possibly hurt your neighbour, who is as much entitled to consideration as you are. Robbing Peter to pay Paul is not a principle upon which British law will act.

### MISCHIEF BY FIRE

sometimes happens to your house, the fire originating on the land of your neighbour. Formerly in England, though not in Scotland, the liability for this kind of damage was exceedingly strict. If fire broke out on your neighbour's land and spread to yours, he was liable for the whole of the damage sustained by you, even if he had not been guilty of any negligence. Thus, if his servant, lighting a candle, went to sleep without putting out the light, and the candle tumbled to the floor and set alight his house and yours, he was liable to pay you for your house and furniture. This liability was part of the custom of England, enforced by the people themselves at first; and by the Courts of Law afterwards. In fact, a fire originating by the purest accident rendered the occupier of the premises upon which it started liable for all its devastations. One case on record was where an agricultural labourer kindled a fire of rubbish in his master's field, and a wind and tempest arose which carried flaming straw into the rickyard of a neighbouring farmer and set fire to a haystack. There the master of the man who lighted the fire was held responsible for the loss of the haystack.

The only case, in fact, in which you might escape liability was when the fire was kindled by an utter stranger—that is, by someone who was really trespassing on your land. For instance, if a tramp settled for the night in your outhouse without going through the formality of asking leave, and then, after the manner of his kind, lit his pipe and threw the lighted match on the floor—a fire arising in this way you would not be answerable for. But any other kind of fire you would have to keep within bounds at your own risk, and if you failed, whether by accident, negligence, or design, so much the worse for you.

The law is now modified to this extent, that your neighbour is no longer liable for the consequences of a pure accident, but he is, if the fire broke out through the negligence of himself or his servants. Negligence, in a legal sense, means **the doing of something which a reasonable man would not do, or the not doing of something which a reasonable man would do.** Take, for example, the case of Farmer A, who made a rick of hay on his land quite close to, indeed almost touching, some wooden and thatched cottages belonging to B. The hay was in a damp condition when put up into the rick. As is well known, green or damp hay will, from natural causes, ferment and ignite, and so it was in this case. Farmer A's rick ignited, and the flames spread to B's cottages, which were burnt to the ground. B brought an action



against A for the value of the cottages, and the judges held that he was entitled to succeed, because no reasonable man would have stacked his hay while it was in such a condition, and put it in such close proximity to another man's house. A had been told several times about the dangerous condition of his rick, but to all warnings he merely replied that he "would take his chance." Now, to do a thing which may result in damage to your neighbour and take your chance of the result is what no reasonable man would do, and consequently it is negligence.

**A fire in the chimney** may involve you in serious complications with your neighbours. I heard a case once in which a woman who was making lard let the pan slip, so that about a gallon of boiling fat dropped on the fire. There was an enormous blaze, and, the chimney being in an unswept condition, dense clouds of smoke issued therefrom for several minutes. This smoke fell in the form of "blacks" on some fruit exposed for sale outside a shop next door, and the occupier of the house where the fire occurred had to pay for all the grapes, bananas, etc., that had been rendered unsaleable.

#### MISCELLANEOUS NUISANCES.

I have discussed the principal kind of nuisances by which you may annoy your neighbour, or your neighbour annoy you. They are, in effect, smoke, smell, noise and vibration created by him or by his servants. But there are other nuisances for which you have a remedy. I mean nuisances of which your neighbour is the cause, though he does not actually create the nuisance. The chief of these is causing a crowd to assemble regularly before your house so as to disturb your comfort. The disturbance must not, as I have said in the case of other annoyances, be merely fanciful. You must have something substantial, which would annoy an ordinary person, to complain of.

The kind of case I have in my mind is that of a certain music-hall in London, where some African women, called "The Amazon Warriors," were engaged to give an entertainment. The performance consisted of whooping, war-dances, and sham fights, and the dusky ladies were tastefully attired in large cotton sheets and feathers. They used to be driven up to the music-hall every night at about nine o'clock in an open wagonette, and in about three quarters of an hour, when their performance was over, were conveyed to their quarters in the same way. Crowds assembled nightly from about half past eight to ten at the stage door of the hall to see the Amazons' entrance and exit.

The assembling of these crowds seriously annoyed the neighbours of the music-hall. Those who kept shops complained that their customers could not reach the doors. Moreover, the yelling and horseplay of the mob rendered it impossible for the neighbours to enjoy the privacy of their rooms. Accordingly an action was brought against the music-hall. They said: "We do not make the noise. We cannot help the assembling of the crowd. How can we forbid the public to crowd round our stage door? There is nothing unlawful in our engaging the warriors to perform at our place of amusement."

But all these pleas went for nothing. The defendants were told that they,

by bringing this unusual show to be seen at this spot, practically invited a crowd to assemble. Every man, as I have said elsewhere, is supposed by law to know the probable and reasonable consequences of his acts. The train of reasoning may be stated succinctly thus:—

I bring an unusual sight into a busy street;

An unusual sight will almost invariably cause a crowd to collect;

I ought to know that the unusual spectacle will probably cause a crowd to collect;

Therefore, I am responsible for the collecting of the crowd, if I bring the unusual spectacle there.

And so the music-hall found an injunction granted against them to prevent them from carrying on their business so as to annoy their neighbours.

There was also the case of Mr. Penley, whose play, called *Charley's Aunt*, was so popular that all the town crowded to see it. The pit door was besieged two hours before the time for admission, and this state of things continued for months. There was a man next door who kept a common lodging-house—the sort of place where beds are let by the night to poor people who can only afford a few pence for their lodging. The crowds which gathered at the pit door of the Globe Theatre seriously obstructed the door of the common lodging-house, and prevented the proprietor from using his place in the ordinary way. His would-be lodgers, he said, could not penetrate the crowd, nor could he and the other occupants of the house get out. And so Mr. Penley was brought before the Chancery Court, and the popular actor was informed that he must not carry on his own business in such a way as to prevent another man from carrying on his.

Do not run away with the idea that you have any right to complain of your neighbour if he merely causes a crowd to assemble once or twice, or merely *occasionally*. If you happen to live in a fashionable quarter, next door to a lady who gives frequent entertainments, you are highly likely to have the approaches to your own house blocked every now and then by the carriages waiting to set down or take up the guests for Lady Knoddy's ball. This may occasionally irritate you a little, but you cannot do anything to prevent it.

The number of kinds of nuisance is infinite, and it will suffice, in conclusion, to say this: Your neighbour has no right to do anything on his own property, even if it be quite legal, so as to interfere with you in the reasonably comfortable enjoyment of your house. Any infringement of this rule is a nuisance. If he, by an unusual exhibition, causes a crowd to assemble frequently, or places an obstruction in the way of you, your family, guests, or customers, it is a nuisance. It has been held that if your neighbour's tree overhangs your fence, it is a nuisance.

**Abating a nuisance** is a term frequently made use of. It means, putting an end to, or removing, the cause of an annoyance such as I have described. It is good law that if my neighbour has something on his land which causes a nuisance to me, I am justified in going on his land and abating the nuisance myself. But first I must give him notice to abate it himself.

This, as I say, is good law. At the same time, *I hardly advise anyone to practise it*. For the law only gives this power to be used in extreme cases, and the privilege is so limited that, if you do one farthing's-worth of unnecessary damage to



your neighbour's property, he can make you pay heavily for it. You are in the position of the much-maligned Shylock: you are entitled to your "pound of flesh," but if, in the taking of it, you "shed one drop of Christian blood," so much the worse for you. To drop metaphor, you are entitled by law to abate a nuisance which exists on your neighbour's land; but if by one jot or one tittle you do more, you will render yourself liable for heavy damages.

That is why I have never yet been able to advise anyone to take the law into his own hands. The game is not worth the candle in nine hundred and ninety-nine cases out of a thousand. But what about the thousandth case? Well, there may sometimes be such a state of things as to make it imperative for you to act. I mean, if the danger to you or your house is so pressing that you cannot do anything else, you may abate the nuisance yourself, and go on your neighbour's premises to do it. In a case of *urgent necessity*, the law excuses you even if you do cause a little damage. For instance, if your neighbour's water-pipe bursts, and your house is in danger of being flooded, you may climb the fence and stop up the leak. And even if, in doing this, you trample on his flower-bed, and crush his geraniums and tulips, the law will hold you quite harmless.

If you can **abate the nuisance without going on his land**, you may do so, and you are *not* obliged to warn him first. I only know of one case where this has been done—that is, properly done. It was the case of two neighbours who were on anything but friendly terms, and one of them, whom we will call Jiggs, had a tree which spread out its branches wide, some of them extending over the fence into the garden of his neighbour, Miggs. How in the world this hurt Miggs, I don't know. Maybe it injured his feelings to know that Jiggs had such a fine tree. Maybe he wanted to grow something requiring plenty of sun. But for whatever reason, Miggs one day took unto himself a saw and therewith sawed off the branches of Jiggs's beautiful tree level with the fence. Jiggs spent a few hundred pounds in trying to make his neighbour pay for cutting that tree; but Miggs was victorious all along the line. "He ought not to have cut the branches at all," said Jiggs. "He was entitled to abate a nuisance," the House of Lords replied. "At least he was bound to give me notice first, so as to give me a chance to do it myself," pleaded Jiggs. "Not unless he wanted to come on your land," was the answer. "So long as he kept in his own ground he could do it himself without any warning." And so the matter rested. But whether either party derived any satisfaction from his conduct in the long run, history sayeth not. I know that I should not go to law about such a trifle.

**Eaves-dropping.**—This section has not anything to do with spies; nor does it deal with that class of persons who, we are told on good authority, "never hear any good of themselves." It has to do with eaves-dropping, not in its figurative but in its literal sense—that is, with droppings from the eaves. It is anything but pleasant when the rain-water collected on your neighbour's roof drops into your premises. He ought to provide a proper waterspout, so as to consume his own eaves-droppings on his own premises. If he fails to do this, and you are annoyed thereby, you have a substantial complaint on the ground of nuisance. It is no defence for your neighbour to say that he has done his best. His best is not good enough unless he remedies the defect. Some houses are so constructed that the

water running from the roof during a rainfall is turned on to an adjoining house. This is illegal, unless consent has been given to that course, and an injunction (in Scotland, an interdict) may be obtained to stop it. Actions of this kind are rare, but are not altogether unknown. It should be noted that if you allow your neighbour to run his eaves-droppings on to your premises for twenty years, you lose your right to forbid him continuing to do so.

The **poisonous tree case** is one well worth knowing. A local Burial Board planted, as is customary, yew trees in the cemetery. One of these trees was so close to the fence which divided the cemetery from the field of a Mr. Crowhurst that its branches overhung the fence. Mr. Crowhurst's field was pasture land where horses were put to graze. One of the horses nibbled the overhanging branches of the yew tree and was poisoned, so that he died. Mr. Crowhurst brought an action against the Burial Board, and recovered the value of the horse.

**Wire fences** are becoming more and more common every day. Some years ago an iron foundry in Yorkshire put up one of these fences to divide their land from that of their neighbour, Mr. Firth. In the field Mr. Firth kept a cow. One day the cow, while feeding near the fence, swallowed a piece of rusty iron wire, which wire had somehow dropped off the fence. Farmer Firth naturally objected to pieces of iron wire being mixed up with his grass, and sent in a claim to the iron company, who refused to pay; but the Court of Law decided in favour of the farmer, and told the company that if they put up wire fences they ought to keep them in order.

Of the same nature is the case that arose between two neighbours who kept horses. One of them had a horse in his field, and the other a mare in the field adjoining. The fence here was a wooden one, of the usual rail and post kind. While the animals were engaged in a discussion one day, the horse lost his temper, and with a sad lack of the chivalry due to the weaker sex, lifted his heels over the fence and kicked the mare. So vicious was the assault that the mare died, and her owner brought an action against the owner of the horse to recover her value. He succeeded in his claim. Why? Because the horse, in the first place, had no business to put his hoofs over the fence, and, in the second, had no right to assault and batter his equine neighbour.

**Dogs that bite** are by no means pleasant neighbours. I daresay you have often heard it said that **a dog is entitled to one bite**, which is a facetious way of putting a legal principle, and, like most epigrams, is not absolutely true. Let me show you what the legal position really is. The law of England always looks upon a dog as an animal without vice until you can prove that he is really vicious. Consequently, the man who keeps a dog is not under the same liability as he who keeps a bear, or a tiger, or a monkey. These beasts are well known to be savage and mischievous by nature, and therefore, if you keep one, you keep it at your own risk. Should your pet bear break loose from its cage and do damage, you will have to pay for it.

But if you keep a dog, you are entitled to presume that it is of gentle and amiable disposition until you find out the contrary. That is what is meant by saying that a dog is entitled to one bite. If your new



dog bites little Tommy Jones, you can defend any action by saying, "I did not know the dog to be vicious. It is the first time I have ever heard of him biting anyone." And so you will be excused. But if your dog bites another person, you have not the same excuse, because you did know the animal was vicious. The point is not whether the dog has, in fact, bitten someone before, but whether *you knew*, or had reason to believe, that he had done so.

Although a dog is entitled to one bite, **he is not entitled to one worry.** At one time he was; but so many cases arose of sheep-worrying by dogs that the Legislature interfered, and an Act of Parliament declared that the owner of a dog should be liable for any sheep that the animal worried. So that it comes to this: If I am bitten by a dog, I have no redress against its owner unless I can prove that he knew the beast to be vicious. But if my sheep are worried by my neighbour's dog, I have redress, whether the animal was known to be vicious or not.

As I have said, if you keep an animal of a ferocious disposition—that is, a wild beast—you keep it at your own risk. Should it escape, whether by your fault or not, you must answer for the consequences. A good instance is the famous **Monkey Case**. Mr. X kept a pet monkey, Jacko by name, which had been brought as a present from some Eastern country. Jacko was generally kept on a chain, but one day he broke loose, and climbed over the garden wall. It so happened that Mrs. Y, the next-door neighbour, was celebrating her annual spring-cleaning festival, and her lace curtains, antimacassars, and other household draperies were hanging out to dry. Jacko mounted the clothes-line, and in a very short time took out all the pegs. Moreover, he amused himself by tearing up the lace curtains. Mrs. Y did not suffer her hangings to be destroyed without entering an emphatic and energetic protest. She and her servant sallied forth armed with brooms, wherewith to drive out the spoiler, but the monkey grinned at his assailants and showed his teeth so viciously that the terrified women retreated with more haste than dignity. Jacko's master refused compensation for the damage committed by his pet, whereupon Mrs. Y took the opinion of a judge and jury on the matter. His lordship laid down the law to be this: There is nothing absolutely unlawful in keeping a monkey. At the same time, it is, or ought to be, known to everybody that these animals are impregnated with mischief. And if you take unto yourself something which, if it escapes, is almost certain to do mischief, you must prevent its escape somehow. If you don't, so much the worse for you.

**Strange Pets.**—There was a case in London not very long ago where a gentleman had quite a large party of snakes at his house. These animals were quite harmless, either because they belonged to a non-poisonous variety or because their fangs had been drawn. It seems that their owner did not keep the reptiles in strict confinement, but allowed them to wander all over his house. As might have been expected, one of them occasionally made his way out, and the people in the immediate neighbourhood would be startled to see a snake crawling in through an open window. I confess I should not like to have lived in that locality. One neighbour, a lady, who stated that "her nerves had been shattered" by a succession of these unpleasant apparitions,

complained to a police magistrate. That gentleman, however, could do nothing. The only kind of nuisance that a magistrate has power to deal with is one injurious to health—that is, an unwholesome or insanitary nuisance. And as it could hardly be said that snakes are insanitary, nothing could be done.

Was there no remedy, then? *I think there was.* The lady ought to have gone to a judge of the High Court, in other words, to have commenced an action claiming an injunction to stop the snakes from trespassing on her land. The worst of it was, that such a proceeding would have been rather expensive. There was another way, I think. She might have killed the snakes. I told you before that you must not kill your neighbour's property if it trespasses on your land, and now I am saying you may kill his snakes. How is the one statement reconcilable with the other? In this way: a snake, or other wild and untamed animal, is not your neighbour's property, for the simple reason that it cannot be the property of anyone whatever. There is a vast difference between animals of a domestic nature—what we commonly call tame animals, such as sheep, cattle, fowls, and the like—and wild animals like lions and tigers, snakes and monkeys. The latter kind do not, in the eye of the law, belong to anyone. It was so once with dogs; but this has been altered, so that your faithful Carlo is now your legal property.

One of the curious consequences of this law is that it is impossible, in law, to steal a wild animal. The reason is logical enough. Stealing is wilfully and wrongfully to take away another man's *property*, intending to deprive him of it. Consequently, if I take away from you something which the law does not recognise as property, there is no theft. Before the Act of Parliament known as the Dog Stealing Act was passed in 1861, it was not theft to take away another man's dog; but that statute interfered for the protection of dog-owners, and made it a crime to steal a dog. Stealers of dogs even in the old days sometimes met their deserts, for though it was no crime to steal a dog, it was a crime to steal a dog's collar. And many a rascal was sent to prison for six months for stealing a collar or a muzzle, when it was impossible to touch him for stealing the dog itself.

#### ABOUT YOUR REMEDIES.

**Promptitude** is the soul of business; it goes a long way also in law. If your neighbour begins to do something on his land which may be a nuisance to you, you will do well to act promptly to put a stop to it. For instance, if you have a right of light to a certain window, and your neighbour begins to build a wall which will have the effect, if carried higher, of obstructing your light, this is how you ought to act: Call at once and see him, or send a note, saying that you have a right of light for this window, and asking him whether or no he intends to build higher. If his answer is not satisfactory, go at once to your lawyer and instruct him to take instant steps to prevent the further heightening of the wall. He can always obtain an injunction to stop the threatened danger, so that your light will not be darkened. *But if you wait until the wall is built* before you complain, you will not be in such a good position. The Court may order a man not to go on with building a wall, but they will not easily order him to pull down one already built.

You still have a remedy, it is true, and that is to obtain compensation in money



for the injury done to you. But this is not half so good as preventing the evil altogether. Therefore, I say—be prompt.

As I had occasion to remark in the Introduction to this work, there is as much need to tell the man in the street what the law is not as to tell him what the law is. And therefore I shall now devote a little time to destroying

### SOME POPULAR SUPERSTITIONS.

**Coming to a Nuisance.**—It will be best to put this case in a concrete form. A carries on a business of an iron smelter at the St. Mary's Smelting Works. He has carried on his business at the same place for some years. B buys or hires a piece of land next to the works, and builds a house and comes to live there. As everybody knows, the smoke and fumes proceeding from a smelting factory's chimneys are neither pleasant nor healthy, and whenever the wind is in the east, or north-east, as it frequently is in England, the smoke from the St. Mary's Smelting Works is carried over B's house and garden, destroying the vegetation, causing an unpleasant smell to pervade the place, and perhaps even causing some of B's family to fall into ill health. B writes to complain of the annoyance, and requests A to take measures to prevent its repetition. To this A replies that he uses all the precautions known to science to prevent the escape of smoke and fumes from his chimneys; that it is impossible to do more; and, lastly, that he, A, was there years before B came to the place. "If you chose to come and live next door to a smelting works," A argues, "you might have known what to expect."

It certainly seems a very reasonable argument, and it looks very strange that B can succeed in an action against A; nevertheless, such is the law. *It matters not a jot whether A was there first, or B; whether A took the nuisance to B, or B went to it.* And I will tell you why. If I have a piece of land, Greenacre, and next to that A has a piece, Blackacre, on which he builds a smelting works, am I to be practically prevented from building on my land, and making use of my property in a way beneficial to myself and injurious to no one? I say "practically prevented from building," because of course it is quite useless to build a house which no one can inhabit because of the fumes from the smelting works. It seems to me that the argument of hardship to me is quite as strong as A's argument of inconvenience to him. He established an offensive trade on his land before I wanted to use mine. Is it, therefore, reasonable that he should continue it when I do want to use my own property? There is much to be said for the reasonableness of the views of both sides; but in a case decided several years ago, when the facts were such as I stated at the beginning of this section, the House of Lords, the highest legal tribunal in Britain, laid it down emphatically, that it does not matter whether you go to the nuisance or the nuisance comes to you.

Let me show you to what an extent this principle carries us. Smith wants to start a business of a peculiarly offensive kind. He knows it would be a nuisance to his neighbours, so he goes somewhere where there are no neighbours. I mean by this, that he sets up his works or factory in the middle of a moor in Cumberland, where his nearest neighbours are six or seven miles away in any direction. There he carries on his trade, making whatever noise he likes, creating horrible smells

and clouds of smoke. Nineteen years afterwards, Jones rents a piece of moorland within three or four hundred yards of Smith's factory, and thereon builds a country house. The noise and smoke and smell of Smith's works interfere with the comfort of Jones's new mansion; in fact, he has no comfort at all there. The noise goes on night and day, and he can get no sleep. The unsavoury odours penetrate to all parts of his house, and the smoke blackens his windows and falls in clouds of "smuts" upon his trees and shrubs. It may be very hard on Smith, but Jones has a legal right to reasonable comfort, and Smith must contrive in some way to cut down the smell, the smoke, and the noise.

This leads me to consider another popular fallacy. Smith may say, "I have done all in my power to mitigate the nuisance, but it is impossible to carry on my business in any other manner." Is this a sufficient excuse to exonerate him in the eyes of the law? A great many people think it is. But they are mistaken. The question is not whether that particular trade can or cannot possibly be carried on without offensiveness. It is whether your use of your property seriously prejudices your neighbour in the enjoyment of his. It is, therefore, no excuse for annoying a neighbour by committing a nuisance to say that the particular act is lawful in itself and is being done in as careful a manner as possible. You may take all the precautions known to expert science, but if you do not remove the nuisance, you must either stop the business altogether or try to make an amicable arrangement with your neighbour.

Is there, then, no way by which a man may set up an offensive but legal trade without risk of actions either present or future from his neighbours? I answer, that the best thing to do, if you intend to set up in such a business, is to choose one of two places—either a place where that kind of trade is already being carried on, so that yours will make no difference to the comfort of the locality, or else a spot remote from society, and offer to pay the owners and tenants of the adjoining fields a lump sum down for the right to establish the nuisance near them. If you do not adopt these precautions, you will run this risk: at any time *before twenty years* have expired you may be stopped working by some neighbour whom you annoy by your trade. Someone may build a house and come to live near, and have a legal right to complain of the smoke, etc., floating over his domain.

If a noxious or offensive trade has been carried on for twenty years or more, the trader cannot, as a rule, be prevented from carrying it on in the future because it annoys a neighbour. But there is this important qualification: the trader must not only be able to show that he has worked the business for twenty years, but also that the smoke, or smell, or noise complained of has been passing over his neighbour's land all that time. I hope I make this quite clear. A manufacturer has carried on the manufacture of steel plates by a particular process for, say, eighteen years, and then adopts a new process, in exercising which his chimneys emit more smoke and smell. The old process caused both smoke and smell, but not to anything like the extent. Indeed, so slight were they that Farmer Hodge, who lives a quarter of a mile away, hardly noticed them. But he does notice the



nuisance caused by the new process, and it annoys him very much. He is entitled to an injunction to prevent a continuance of the nuisance. So that an offensive or noxious trade is safe against the complaints of neighbours after twenty years' time. But there is a qualification. If the trader has acknowledged the right of the neighbour to stop the objectionable nuisance, the twenty years does not matter. The usual way of making his acknowledgment is by paying something to such a neighbour as compensation for the annoyance. Every payment so made is an acknowledgment that you have no right to carry on the business without making some compensation.

I was present in Court once when a case was tried, brought by the owner and occupier of a cottage in a lonely part of the North of England. This man had rather an odd means of livelihood. Three or four factories and chemical works in his neighbourhood paid him a kind of pension as annual compensation for nuisance. Many years before, the man had bought the cottage and gone to live in it, but he found that when the wind blew from one particular quarter he received the full odour of a chemical works hard by. So he went to the manufacturer and demanded compensation, and this the manufacturer agreed to give, rather than go to the expense and risk of fighting an action for nuisance. The compensation took the form of an annual payment of ten pounds. In course of time, a second chemical works was built in the same locality, and the cottager found that when the wind blew from another quarter he had the full benefit of that smell. The second manufacturer was accordingly interviewed, with the result of a second annual payment of ten pounds being promised. Shortly afterwards, a third tall chimney appeared, this time for an ironworks. Again the guileless cottager was to the fore, suggesting that really the damage to his garden, besides the dirt caused by the smoke when the wind was in the north-north-east, rendered it only fair that he should be compensated, and the iron manufacturer also agreed to pay ten pounds a year. Exactly the same thing occurred with a third chemical manufacturer, so that the cottager became possessed of a comfortable annuity of forty pounds—nearly, as the Irishman said, an annuity of a pound a week. In six years he had drawn about twice as much as he originally paid for the cottage, and he was saving money fast, when the four manufacturers happened to be dining together one day, and one of them mentioned the fact that he was paying ten pounds a year to old Nokes, the man who lived in the old-fashioned cottage. "I offered to buy him out, the other day," said the man of smells, "but he told me he didn't like to leave the old place." When each of the four found that the other three were paying ten pounds a year to the old countryman, it dawned upon every one of them that the said guileless rustic was drawing a sum of £40 a year for damage to the comfort of a house not worth more than £120—and probably dear at that. Four several letters were written, and by way of answer the ancient cottager went to a lawyer, and issued four writs against his former tributaries. In the end, it cost these gentlemen twice as much to fight it as it would have cost to go on paying the yearly tribute. A jury awarded the plaintiff £60 against each of them, and they had to pay all the costs and expenses of the actions.

**‘Trespassers will be prosecuted.’** This legend, inscribed upon a beard, sometimes pleasantly varied by the addition of the words, “with the utmost rigour of the law,” is another popular bogey. For, as Sir Henry Hawkins once said, such a notice-board is a “wooden lie.” To put it in less forcible language, trespass itself is no crime; though it is criminal to trespass in search of game, or to trespass and do wilful and malicious damage. If you find a man trespassing on your land, you have two remedies. One is to take him by the collar and turn him out, using no more force than is necessary. But beware of using too much force, or you will yourself be guilty of a crime—namely, assault. The other remedy is to bring an action for damages, either in the High Court or County Court (in England), or the Court of Session, or the Sheriff’s Court (in Scotland). You can recover, in this action, all the damage that has been done by the trespasser, with something extra if he behaved rudely when you ordered him off.

#### WHOSE LEAVE YOU MUST OBTAIN BEFORE CREATING A NUISANCE

When anyone wants to carry on an offensive trade, or do anything else which will be an annoyance or nuisance to his neighbour, the best thing he can do is to *purchase that neighbour’s consent*. Now, as you will have gathered from the preceding pages, nuisances may be of two kinds: (1) those affecting the neighbour’s comfortable enjoyment of his house and land, and (2) those affecting the house or land itself.

In the first category come noises, smells, smoke, and the like. In the second category come subsidence—causing the house or land to sink—and interference with light.

It is necessary to notice this difference, because on it a great deal depends. If Mr. Smelter, the iron manufacturer, establishes a foundry next to my house, it will not affect the *structure* of the house itself, but the noise and smoke will affect *me*, as tenant. Therefore I, if anyone, must complain, and if Mr. Smelter likes to pay me to put up with the annoyance, he is all right. If I leave and my friend Brown hires the house, Mr. Smelter will have to get *his* consent also.

But if Mr. Collyer, the pit-owner, digs his coal-mine so near to my house that he causes the foundations to give way, not only has he disturbed me in the enjoyment of my dwelling, but he has injured my landlord by damaging his property. Mr. Collyer will therefore have to make reparation to both of us—to *me* for a nuisance to my comfort, and to *my landlord* for a nuisance to his house.

The only way, in point of law, for the man who proposes to create a nuisance to do so with impunity is to buy the right both from the owner and the occupier. I have known of cases where a sum has been paid to the owner of a house for permission to build so as to obstruct an ancient light. And then the builder has been surprised when the tenant has brought an action to stop the building.

Let me put it this way: You have taken a house with an east window, which window has been unobstructed for twenty years or more, and by going that time without interference has acquired a right of light. Then the owner of the adjoining land wants to build in such a way as to interfere with the



light of that window. He goes to the landlord, who, for a consideration, grants him leave to build in the manner he desires. The building commences. When you see that your window is to be obstructed, you naturally object, and you complain about it. The builder replies that your landlord has given him leave to put up the obstruction. Your very proper answer is, "When I hired this house I hired all the rights and conveniences belonging to it. My landlord has no more right to give you leave to take away the light than he has to give you leave to take away the roof." And your position will be unassailable. The building cannot progress without your leave also.

I have taken pains to state this point at some length, because I have known of tenants who were quite unaware of their rights in such matters. They have thought that the landlord, in such a case as I have instanced, had the power to authorise the building. It is a mistake. When your landlord lets the house to you, he parts with the control of it, and not only with the control of the house itself, but the control of all rights attached to the house. You are, in fact, so long as your tenancy lasts, practically the owner—so far as outsiders are concerned.

#### FLATS.

The neighbour is, perhaps, more important to the dweller in a flat than to one who lives in an ordinary house. This is necessarily so, because he is nearer, and can more easily cause annoyance. As a rule, all the people who take flats enter into strict covenants with the landlord relative to the conduct of themselves and their families, the object of these covenants being to protect each of the residents in the same tenement from annoyance by riotous or disorderly conduct on the part of any other resident.

This does not apply to Scotland, because in that country, seeing that flats are the rule and self-contained houses the exception, it has been found necessary to incorporate the law upon this subject into the general police law of the country. So that north of the Border the duty to the neighbour in the same "land" or tenement forms part of the police regulations of the city, burgh, or county in which you happen to reside. And as these regulations vary in different places, it is out of the question for me to pretend to explain or even to enumerate them. They who dwell in flats in the Land o' Cakes may take it to heart, however, that their behaviour even in their own houses must be very discreet. For instance, there are regulations about keeping the stair clean, about cleaning the windows of the common staircase, about the hours during which mats and carpets may be shaken or beaten, about the lighting and extinguishing of the stair gas, and a variety of other rules which one might expect to find when people are obliged to use premises in common with others.

*In England, on the other hand, there is no general law applicable to neighbours in flats as such.* There is, of course, the same law as that which governs people who live in neighbouring houses—for example, you may prevent the family in the next flat from annoying you by a loud and continuous noise, or by a disagreeable smell. But beyond this the rights of the respective tenants of flats in the same tenement depend on the agreement entered into with the landlord. I was consulted the other day by a lady who had a grievance against

the person living in a flat beneath her. The domestic of the lower flat had a cheerful habit of shaking mats and carpets on the common staircase at all hours of the day, preferably at some time in the afternoon. So that my client, on going out for or returning from her afternoon walk was frequently immersed in a cloud of dust, to the detriment of her toilette and her temper. I was sorry to be unable to devise a remedy, though undoubtedly the grievance was substantial. In Scotland the police would soon have put the matter right, but in England flats are so modern that no law has yet been framed to regulate them. As I have said, however, landlords frequently make rules for the good conduct of flats, and require each tenant to subscribe to these rules and agree to observe them. When this is done, every tenant has the right to enforce these rules in a Court of Law. It is sometimes set up, by way of defence to an action by one tenant against another, that the agreement to observe the rules was made with the landlord, not with the other tenants; but I think it is clear law, as it is clear good sense, that where an agreement has been made in this way for the protection of the tenants against unneighbourly acts on the part of each other, each tenant has the right to enforce the agreement.

#### ABOUT BURGLARS AND THE PROTECTION OF HOUSE AND PROPERTY.

Perhaps this part of the law affecting the householder ought hardly to be placed under the heading of the Householder and his Neighbour. But it is necessary to place it somewhere, and I must ask the neighbour not be offended because I speak of Bill Sikes in the same chapter as his very respectable self.

The stealthy burglar is one of the terrors of modern life, especially of modern suburban life, for it is true to say that of the burglaries committed in our great towns and cities, fully 95 per cent. take place in the suburbs. In vain does the householder invest his money in patent locks and ferocious bull-dogs. The first are picked and the second poisoned.

In Lockhart's *Life of Scott* a good story is told in this connection. Sir Walter once, in his younger days, defended a notorious burglar at the Jedburgh assizes. The embryo poet and novelist fought hard for his client, but the facts against him were too many and too strong, and so the burglar was convicted and sentenced to death. The next day Scott received a message, saying that the condemned man wished to see him. On going to the cell, the lawyer was first of all heartily thanked by the prisoner for making so gallant a defence. Then the man apologised because the fee paid had been so small. "But I'll give you," said he, "two bits of advice that will be worth more to you than money. The first is, put no trust in those newfangled gimcrack locks. Just have a good old-fashioned rusty one, with a big rusty key. The second is, don't keep a big dog *outside* the house. He can soon be got rid of. But keep one of those little yelping, snarling terriers *inside*." And with these farewell words of grateful caution, the man was led off to his punishment. Scott summed up the advice in the following couplet:—

"Yelping terrier, rusty key,  
Was Walter Scott's best Jeddart fee."



Now let me consider the burglar from a somewhat more legal point of view, and that is this: **How far may a householder go in resisting** the unlawful aggression of one of these nocturnal intruders? There is a common idea abroad that, if you find a burglar in your house, you are quite entitled to shoot him or knock him on the head. Let us ask, then—

**Is it Lawful to Shoot a Burglar?**—There is a story in Montagu Williams's "Leaves of a Life" very much to the point. An old schoolfellow of Williams's, a sporting country magistrate, was aroused one night by his butler, with the news that a burglar was in the house. The householder at once rose and, seizing his gun, went downstairs very softly. He then ordered the butler to go towards the pantry, where the burglar was, and to take care to make a noise. The servant followed these instructions to the letter, and the burglar, hearing someone moving in the house, did what it was expected he would do—namely, climbed out of the pantry window and ran away. Now, he had to cross a lawn in front of the drawing-room window, where our friend the magistrate was waiting with both barrels loaded. On sped the thief, but when he was about forty yards from the house, he dropped, with two charges of shot in the small of his back. The worthy magistrate had, in fact, treated him like a rabbit which bolts from its hole when it hears the ferret coming.

The sequel was, that this most unpeaceful Justice of the Peace was brought before his brother magistrates on a charge of unlawful wounding, much to his surprise and disgust. He thought he had a perfect right to treat a burglar as vermin.

Now, before I read this story I had no idea that anyone could imagine that a householder had the right to shoot or otherwise maim or seriously injure a burglar. But it struck me that if a magistrate, who had at least some experience in administering the law, took this view, it might be that other people took it also. I accordingly took pains to make inquiries, and I found the belief was rife that a householder who catches a burglar red-handed in his crime is justified even in killing him.

My readers will have gathered from the trend of these remarks that such a belief is absolutely erroneous. There was a law in early times in the Roman Republic that a householder might kill a burglar; but even the Romans, who held life much cheaper than we do, very soon repealed that law. *In Great Britain it never was legal.* Are you, then, bound by law to allow a burglar to continue his nefarious operations without taking measures to stop him? By no means. Every householder is well entitled to protect his house and its contents, and I will tell you how far he may go.

Suppose that Smith's wife hears a man in the house, and duly rouses Smith in the middle of the night, and Smith, arming himself with the family gun or the bedroom poker, searches for and at last finds Bill Sikes in the act of carrying away the spoons. Smith can call on Sikes to give up his booty. He can also try to take that gentleman into custody, what time Mrs. Smith, leaning out of the bedroom window, calls "Police!" and performs a solo on a whistle. If the unwelcome visitor refuses to part with the plunder, and to give himself up quietly, Smith is justified in using force to recover the property and effect an arrest. In all

probability, Bill Sikes will struggle, and, if he does, Smith may use *as much force as may be necessary* to overcome the resistance. But no more. In other words, the householder is not entitled to use a deadly weapon, such as a gun, a revolver, or a "life preserver," or anything whereby he is likely to kill or grievously hurt the burglar, merely in defence of his *property*.

There is, however, a state of circumstances in which even the use of a deadly weapon will be justifiable. Many burglars, as we know, now carry revolvers, and should Bill Sikes be one of these, that is, should Bill Sikes pull out a revolver and threaten to use it, Smith will be quite within his rights if he fires first shot, even if he kills the burglar. The reason is, that a man may by any means in his power protect his own *life* or the life of his wife, child, or servant. So that it comes to this: If the burglar tries to kill you, you may kill him in self-defence; but you may not kill him or maim him merely to protect your property. For the latter purpose—*i.e.* protection of property—you may use your fists, or wrestle with the man, or even use a stick if it is not a weapon likely to kill.

Something more about the protection of your house. I have seen sometimes in country places, notices to this effect:—"Beware of Man-traps and Spring-guns." I do not quite know what these things be, beyond the fact that they are concealed engines of a dangerous kind, intended to damage the limbs, if not endanger the lives, of trespassers. I don't know whether you are aware of the fact, but it is, in law, *illegal to set man-traps and spring-guns* in your grounds.

There was a case a good many years ago, where a householder, named Holbrook, had a garden, in which were some valuable flowers and roots. Mr. Holbrook was an enthusiastic amateur horticulturist, and you may imagine his annoyance when he found that day after day his rare and valuable treasures were stolen. He cast about for some means of protection, and eventually set a spring-gun in his garden. A young man named Bird was out shooting one day, and shot a wild fowl, which, being only wounded, flew into Mr. Holbrook's garden. Bird climbed the wall to recover his prey, and stepped on the spring of the infernal machine, which went off and shot him.

As soon as he recovered from his injuries, he brought an action against Mr. Holbrook. The latter defended himself on this ground:—He said, "Bird had no business to go into my garden. He was a trespasser, and has only himself to blame. I can't be expected to keep my garden safe to protect trespassers." But Chief Justice Best, who decided the case, held that Holbrook must pay for the injuries done to Bird. "There is no act," said his lordship, "which Christianity forbids, that the law will not reach. If it were otherwise, Christianity would not be, as it always has been held to be, part of the law of England. I am therefore clearly of opinion that he who sets spring-guns, without giving notice, is guilty of an inhuman act, and that, if injurious consequence ensue, he is liable to yield redress to the sufferer."

This case attracted a good deal of attention at the time, and formed the subject of several debates in Parliament. In the end, a statute was placed upon the Parliament roll, making it a criminal misdemeanour to set spring-guns or man-traps, unless for the purpose of protecting the house by night, or for destroying vermin. So that if you live in a burglarious neighbourhood, and sow your house



and grounds with dangerous traps at night, be careful to take them up in the morning. For if anyone is hurt in the daytime, you will find yourself liable, not only for damages to the sufferer, but also for a fine, or perhaps imprisonment. So that I advise my readers to beware of *setting* man-traps and spring-guns.

**Burglary Insurance.**—It is a tribute to the conservatism of the British people that every year large amounts of property are lost to the owners by burglary and housebreaking, and considerable loss is sustained ; though there are, and have been for years, several excellent societies which grant insurance policies against loss by burglary. These policies are issued at moderate premiums by many companies that insure against loss by fire, accidents, and so on. When you take out a policy of burglary insurance, you must answer fully and frankly all questions put to you, and must disclose to the society all facts by which the risk would be likely to be increased. Should you be so insured, and should a burglary take place, you can claim the actual value of all the property stolen, so long as it does not exceed the amount of your policy. In legal language, a policy of burglary insurance is a "contract of indemnity" only, and not, as in the case of life insurance, a wager or bet.

## CHAPTER III.

### THE HOUSEHOLDER AND THE CONDITION OF THE HOUSE.

The duty of good drainage—The sanitary authority—Who is liable for good drainage—Drains injurious to health—Your liability for them—Your remedy when your drains are bad—Complications between landlord and tenant—Disinfection—Infected rubbish—Letting unhealthy lodgings—Cleansing of houses—Want of water—Overcrowding—Unhealthy working-class houses—Houses in an unsafe condition—The safety of passers-by—Responsibility for the safety of trespassers—Of guests—Of people who come on business—The unfortunate plumber—The ceiling that fell.

#### DRAINS AND SANITATION.

FROM the point of view of a sanitary expert, it is, as Mr. Chevalier says, "wonderful we're still alive." I do not mean that our own sanitary system is one to find fault with, but what I do mean is that our ancestors lived in such magnificent defiance of all the laws of hygiene that one wonders they lived at all. When we know that their houses rarely had any drains, that when they did have any, those drains generally terminated in a cesspool under the floor or just outside the door, and that they never heard of ventilation, it is not surprising to read how they were stricken down in thousands by the hand of the plague. The modern tendency is in favour of a strict system of sanitation. It is now the law of the land that every dwelling shall have efficient sanitary arrangements—efficient drainage, efficient closets, efficient disinfection when a house or a district is visited by infectious disease. And since sanitation concerns not only the health of the householder, but the health of his family and the public, all this law is of a criminal character. Its enforcement is entrusted to some body in every district which is called the Sanitary Authority, or the S. A. This body is assisted by a doctor who is called the Medical Officer of Health, or M. O. H., and to disobey the lawful requirement of these authorities is to subject the disobedient to fines and possibly to imprisonment.

I propose to show, as briefly and as concisely as possible, the duties and liabilities of a householder with regard to the sanitary arrangements of his house.

**The Duty of Good Drainage.**—Where any house within the district of a local authority is without a drain sufficient for effectual drainage, there is a power vested in the local authority to compel such a drain to be laid down. It is entirely at the *option of the Sanitary Authority* whether they cast this burden upon the owner or the tenant. This is how it is done: The Sanitary Authority, which is the Town or City Council, or the Local Board, or the Commissioners of the District,



give a written notice to either the owner or the occupier, informing him of the work required to be done. As a rule, the notice is served on the person whom the Sanitary Authority think to be best able to bear the expense. I mean that they will generally call upon the owner if the house is a small one, and on the occupier if the house is a large one. The S. A. are, however, quite at liberty to call upon the owner to do the work if they like, and will often do this if the complaint relates to the *structural defect* of the drain. But if the drain is properly laid, and has merely become choked up by the *negligence* of the tenant, it is usual to make the tenant set it right. It is unfair, though not illegal, to make a householder pay for the repair of badly laid drains, and it is equally unfair, though again not illegal, to put upon the landlord the cost of repairing his tenant's carelessness. But what is just is not always expedient, and the business of the Sanitary Authority is to insist on the drain being put right by somebody.

I want you to understand that I am now referring only to the position of affairs between the householder and his landlord on the one hand, and the local authority on the other. It may happen that as between the householder and his landlord, one or other of them is bound to execute these repairs. With this, however, the public authority has nothing whatever to do.

**When neither the landlord nor the tenant obeys** the warning of the Sanitary Authority, the latter can order the work to be done by their own workmen, and then compel either the householder or the landlord to pay for it. One thing the local authority cannot require to be done, and that is the alteration of the *whole system* of drainage, if the present system is efficient. I mention this because there are some Medical Officers of Health who have very faddy theories of their own about drainage. One does not like this system, another objects to that; but if a householder is required to lay down drains on a fresh plan, he is entitled to ask for proof that his present system will not work efficiently. Suppose, for instance, that your house is drained on a system which we will call No. 1. The Sanitary Authority want you to adopt plan No. 2, which plan they consider to be the only perfect one. You will be quite justified in replying, "Your plan may be more perfect than mine, but my plan is not a bad one." It would be absurd if a local authority were able to compel either owner or occupier continually to amend his drains with every latest improvement, when the old ones were in effective working order. We should be perpetually in a state of chaos. The builder and the plumber would thrive apace, but the lot of the householder, like that of the policeman of comic opera, would be "not a happy one."

**Drains that are Nuisances.**—When the drain of any house is so foul or in such a state as to be a *nuisance* or *injurious to health*, the Sanitary Authority may serve a notice upon (1) the person who causes the nuisance, or (2) the owner, or (3) the householder, requiring him to put such drain in good order. A nuisance, within the meaning of this section, means anything offensive so as to be a real annoyance (either to the householder and his family or to a neighbour. Sometimes, however, it is the duty of the local authority to do the work; for instance, where neither the owner nor occupier is responsible for the occurrence of the nuisance, or where the person causing the nuisance cannot be found. It happens occasionally that the sewer, which is under the local authority's own control is to

blame. The sewage washes back from the sewer into the drain, and then it is no business of either the householder or his landlord.

**The remedy of a householder when his drains are injurious to health.**—If such a state of the drains is caused by the householder himself, he is the person liable to do the repairs. Careless housekeepers and servants sometimes pour tea-leaves or grease down the sink-pipe. This forms in a mass and chokes up the pipe, causing a foul smell. Should the Sanitary Authority interpose, the tenant must pay the cost of the necessary repairs. But very often the defect is in the pipes themselves. They are badly laid, loosely fitted together, or made of poor material. In these cases it is the duty of the authorities to take action against the owner of the premises. The tenant has a right to make a complaint to the authorities in such a case, and if they are satisfied that the grievance is real, they will take the necessary steps to move the landlord. As a rule, an inspector or medical officer is sent to inspect the premises to find out the cause of the bad smell, or whatever else is complained of.

As between landlord and tenant, matters become very complicated. As I have said, the sanitary officers may require either of them to repair defective drains. The officers serve the landlord. Upon which he comes round to the tenant and tells him to have the work done. Or notice is given by the authorities to the householder. He thinks he ought not to be put to expense, so he passes the paper on to the landlord. Perhaps neither of them will act, so the Sanitary Authority steps in and does the work, and sends its bill to one of them. The one to whom the bill is sent will be compelled to pay the Sanitary Authority, but he will try to make the other pay him.

Now the question as to who is *ultimately* liable depends entirely on the answer to the question—**Who is liable, under the lease or agreement of tenancy, to do the repairs?** If the tenant has agreed to do all the repairs, he must either put the drains in himself or else pay the landlord or the local authorities to put them in. If the landlord has agreed to repair, he must either do the work, or pay the tenant or the authorities for doing it. But if neither of them has agreed to repair, what then? The answer is, whoever is served with the notice by the Sanitary Authority is liable to pay.

The difficulties chiefly arise when the covenants to repair are qualified. For instance, "the landlord agrees to do outside and the tenant inside repairs." In this case the question of liability wholly depends on where the defect is. If it is an inside water-closet, and the defect is anywhere inside the wall of the house, or if, though the actual burst is outside, the cause of it arose inside, the tenant must pay. But in the converse case the landlord would be obliged to make it good. Perhaps the repairing clause upon which the most controversy arises is the one in which "the tenant agrees to do all repairs except structural repairs; structural repairs to be done by the landlord." This kind of thing happens: A sanitary inspector is called in to find out the cause of certain bad odours, and he at once pronounces that there is something wrong with the drains. He then reports to his superior, the Sanitary Authority of the district, and this body gives notice to the tenant to put the matter right, or to the landlord, ordering him to do what is necessary.



As I have said before, it does not matter to the Sanitary Authority whether the landlord has agreed to repair or the tenant. They two must settle it between themselves. I will suppose, therefore, that the tenant has been served with the notice, which requires him to put in the new drain, or to put a new pan into the water-closet, or to repair an old soil-pipe by putting on a new joint, or to re-lay the drains altogether. Let us see in what cases these amendments come under the heading of structural repairs. There are some tenants who imagine that if they put in anything new it is a structural repair. There are some landlords, on the other hand, who think no repair to be structural unless it relates to the main fabric of the building, meaning thereby the four outside walls and the roof. You may say, as a rule, that any repair which will substantially improve the house, *as a building*, is structural. Further than this you cannot go. To put in a new water-closet is structural, or to put in new drains, but not to put in a new water-closet pan or one new pipe merely.

**Disinfection.**—Unfortunately, even when the sanitary arrangements of a house are of the very best, the householder cannot prevent disease from attacking him and his family. With the cause of diseases, their symptoms and cure, I have nothing to do. Those matters rather concern the family doctor.\* It is my business, however, to point out that the presence of disease in the house sometimes places the household under certain legal obligations. These obligations mostly, if not all, arise when the diseases are of the kind known as *infectious*, of which the most usual types are typhus, typhoid (or enteric), scarlet and puerperal (childbirth) fevers, erysipelas, diphtheria, cholera, small-pox.

Every householder who has been visited by one of these scourges is bound to take certain *precautions against the spread of the disease*. Of these preventive measures the most important is that of disinfection. It is believed by experts that the germs of diseases are carried about in such things as clothing, bed-clothes, and other articles made of textile stuff, such as cotton, woollen, and linen. Those of you who know the little Derbyshire village of Eyam will remember the local tradition that the plague which raged there at the same time as the great Plague of London, was carried from the metropolis in some tailor's patterns. The law does its best nowadays to check the propagation of infectious diseases through clothing. The Sanitary Authority of every district is bound to provide, gratis, convenience for disinfecting clothes, bedding, and such like. The householder, on his part, or the doctor attending the case, is bound to send notice to the Sanitary Authority when he has an infectious disease in his house. Then the Authority must send for those articles which need to be disinfected, and must cause them to be disinfected at the public expense. It is only fair that the public should pay for what is done by way of precaution for the public health. Besides the disinfection of particular articles, the householder is bound to look to it that his *house* is disinfected also. He can take his choice between doing it himself and calling on the Sanitary Authority to do it. He may call in his own doctor and do

\* "Cassell's Family Doctor." (London: Cassell & Co., Limited.)

what is necessary under the advice of that gentleman, or he may send to the Sanitary Authority and require them to do it. If it should come to the knowledge of the local authorities that you have had a fever or other infectious disease in your house, they ought to inquire whether or not you have had the place disinfected. If you cannot show them that the proper steps have been taken, to the satisfaction of a medical man, a notice will be served on you, ordering you to disinfect within twenty-four hours. From one cause or another you may not obey this notice, and in such a case the Sanitary Authority are at liberty, and indeed *must*, at the end of the twenty-four hours, enter your house and do whatever is necessary. It only remains to be added that *a householder who refuses* to allow his house or infected articles to be disinfected may be summoned before a magistrate and fined. In populous towns and cities such precautions as these are eminently necessary, and though it may not be pleasant for a householder to submit to visits of the local officials, let alone to the horrible, offensive smells of the disinfectants, he must bow to circumstances and the law. For should he disregard these regulations and find himself before a magistrate, I will warrant that he receives very little sympathy. The magistrate will say, "There is no excuse. You could have had all this work done by the Sanitary Authority for nothing, and yet, merely to save yourself a little trouble and inconvenience, you risk the health and even lives of your family and your neighbours." And the worthy gentleman will conclude his remarks with "Fined £— and costs."

In country districts the sanitary laws are not administered with the same rigour as in towns. I know of no reason why they should not be enforced just as strictly, for anyone who has lived in a village knows with what alarming rapidity an epidemic spreads. Under the District Councils, however, great improvements have been made in all respects.

**Compensation for Damage.**—It is sometimes necessary for the Sanitary Authority to destroy articles of clothing, etc., it being thought safer to do this than to attempt to disinfect. Sometimes, also, they damage the house while disinfecting it. In both these cases the loss must come out of the public pocket, and the householder whose property is damaged or destroyed can claim compensation for his loss.

**Infected Rubbish.**—It will come as a surprise to any intelligent person to hear that there are people who, knowing there is an infectious disease in the house, cast rubbish from their house, and even from the very room where the patients are lying, into open ashpits. This is bad enough when the house in question has an ashpit unto itself, for even then there is great danger. It is twenty times worse when this ashpit or midden is one used by other people as well as by the sick household. One of the offences against public health for which a householder may be fined, is the allowing of infected rubbish to be thrown into an ashpit or midden without first of all disinfecting it.

If you find it impossible to accomplish the disinfection yourself, write to the Sanitary Authority and say so. The Authority are bound by law to provide, if required, for the removal and destruction of infected rubbish. You ought, if you are the unfortunate householder with a sick family, to take every care in this



respect. Either disinfect your own rubbish before throwing it away, or else put it in the hands of the persons competent to undertake it.

**Letting unhealthy lodgings** is an offence which the Legislature has also attempted to deal with. The Act of Parliament, however, does not go very far. All that it does is to say that anyone who lets lodgings which have been *occupied by a person suffering from an infectious disease*, and which have not been disinfected, is liable to fine and even imprisonment. There is another provision with the same intent, though not quite to the same effect. People who take lodgings may and sometimes do ask the lodging-house keeper whether the rooms have been occupied by anyone having an infectious disease. If the rooms have been occupied by someone having such an infectious disease *within six weeks previous* to the question being asked, the lodging-house keeper must say so. He must not only say that there has been an infectious disease, but he must also say truly what particular disease it was. If the lodging-house keeper does not give a true answer, he is liable to fine and imprisonment.

I wish you to observe the difference between these two things. The first punishes the lodging-house keeper who *lets* infected lodgings, *however long after* the diseased person has left the house. The second only punishes the lodging-house keeper who, *within six weeks after* the disease has been in the house, *tells* an intending lodger who makes inquiries something which is not the truth. I imagine that very few people, whether lodgers or lodging-house keepers, are aware of these provisions of the law. They ought to be better known, for while they present no terrors to an honest letter of apartments, they afford protection to lodgers against unscrupulous persons who, for the gain of a few pounds or even shillings, would cheerfully imperil the lives of their fellow-creatures. They are the kind of person satirised by Artemus Ward, who made a speech during the time of the American Civil War, in which he said, "I am prepared to make sacrifices for my country. I am prepared to sacrifice all my wife's relations on the altar of patriotism."

**Cleansing of Houses.**—Every householder is legally liable to keep his house reasonably clean. By *reasonably* clean I mean free from such filth as would be likely to endanger health. It is not expected of the housewife that she shall conform to the standard of the Dutch women, who scrub and wash their houses, both inside and out, to quite a painful cleanliness. But the English housewife is bound to remove such filth as would imperil the health of people living in the house, or would be likely to become a centre of infection.

If the Medical Officer of the district, or any other two doctors, certify that a house is so filthy as to jeopardise the lives of the inmates, the householder may be served with a notice ordering him to cleanse and purify his residence. But if he disobeys the order, the Sanitary Authority may themselves come into the house and do the work. There is another way of going about it. The Sanitary Authority may summon the owner or the occupier before a magistrate, and the magistrate will make an order to have the place cleaned. If he makes this order on the occupier, and the latter does not obey, there will be a second summons. This time the consequences will be more serious, for the magistrate will impose a fine. If the Sanitary Authority choose, they may ask the magistrate for an order

to do the work themselves, and when they have done it they will be allowed to charge *the owner* the expenses.

**Water** is most essential for the purposes of health. When a house has no water supply, the chances are very much in favour of an outbreak of disease there. In towns, it is quite necessary that there should be a water-supply in the house itself. In country villages this is not always possible. When the Sanitary Authority of an urban (town) district find that a house has no water-supply, they may order *the owner* to remedy the defect, and if he does not obey at once, they themselves may put in a supply and charge the cost to the owner. The proper course for a householder in an urban district to adopt if there is no water laid on in his house, is to complain to the local authority—Local Board, Parish Council, or whatever it may be—and leave *them* to settle with his landlord.

In a rural district the requirements of the law are not so strict. It is not compulsory for water to be supplied actually to the house, but there must be a sufficient supply within a reasonable distance. This may be the parish pump, or a well, or spring. If this is not the case, the rural householder should complain to the Medical Officer of Health for the district and the local Sanitary Authority, and if they are unable to compel the landlord to furnish a good and wholesome supply, they (the Sanitary Authority) must do it themselves at the public expense. They can, of course, impose a water-rate to repay the expenses. One way is for the Authority to erect stand-pipes in the road, and if they do this, they have the right to charge the occupiers of all the houses within 200 feet of the pipe. But any householder within the 200 feet who has another source of supply and does not use the stand-pipe is not obliged to pay.

**Overcrowding** a dwelling-house is an offence against the law, and any householder who allows his premises to be overcrowded renders himself liable to a fine. Doctors all agree, and experience tells us, that when a great number of persons are together, if the room does not allow them *something like 300 cubic feet of space each*, the air is bound to become vitiated and unhealthy. Overcrowded sleeping-rooms, in fact, are responsible for a great amount of disease, and are recognised as a public danger. The exact degree of crowding which constitutes overcrowding varies in different districts, but as a rule your house is overcrowded unless every individual has an average space of 300 cubic feet to sleep in. A room ten feet long by ten wide and seven high provides 700 cubic feet, and is the legal sleeping accommodation for two adults, or four children, [or one adult and two children, for two children count the same as one adult.

**Unhealthy Houses of the Working Classes.**—I have explained, in the chapter on the Householder and his Landlord, how the landlord of a working-class dwelling is bound to see that it is in good sanitary condition when he lets it, and how he is responsible to the tenant if the house should turn out to be insanitary at the time it was let. But it sometimes happens—very often, indeed—that a working man is unable or unwilling to take advantage of the protection held out by the law. It is curious to see how some people will go on living in buildings so absolutely unhealthy as to be a source of danger not only to themselves but to the public at large. By the



Housing of the Working Classes Act some provision is made for the removal of that class of "slum" dwelling-house which always forces itself upon the notice of one who passes through those parts of our towns inhabited by the poorer classes.

It is the business of the Sanitary Authority of every district to cause inspection to be made from time to time of the houses in their district—that is, of the houses of working men. If the inspectors find that any such dwelling is not fit for human habitation, or is so unhealthy as to be dangerous to health, they report to the local authority. Then a summons is issued against the owner of the house, [and he is ordered to close the place immediately, and then to put it in repair. If the owner refuses to obey the order, the house may be ordered to be pulled down. Sometimes the magistrate will order it to be demolished without giving the owner a chance to repair ; but this can only be done when the condition of the building is such that real repair is out of the question.

I know one magistrate in London who does not trust to the ordinary kind of evidence in such cases as these. The ordinary kind of evidence is this :—The sanitary inspector goes into the witness-box and says, "I know the house, Number 20, Slumb Alley. I inspected it last Monday. The place was in a disgraceful condition. The walls are sunk and leaning to one side. There is a crack in one wall. Half the slates are off the roof, and the ceiling in the bedroom is tumbling in. The floors are rotten and full of rat-holes. The walls are so bad that the plaster has come off owing to the damp. I say the house is quite unfit for human habitation." Then the Medical Officer of Health for the district is called, and he says very much the same thing.

The landlord then calls a surveyor and a medical man, who entirely contradict the evidence for the prosecution. "Injurious to health? Oh, dear no! Hole in the roof? Yes, there is, but nothing serious. It is, in fact, quite absurd to say that the health, either of the tenants or the neighbourhood, could be in any way affected." And so on, after the manner of "expert" witnesses.

You know, an "expert" witness is one who is called to give his opinion. An ordinary witness merely swears to facts. "I saw the prisoner hit Bill Sikes on the nose with his fist," is the testimony of the witness to fact. "In my opinion the injury on the face of Bill Sikes might have been caused by a blow with the fist," is the evidence of a medical expert. You see, one says what he knows, and the other what he thinks. Lawyers have, as a rule, the poorest possible opinion of "expert" evidence, and not without some justification. A judge said once that he would not give a sixpence for all the expert evidence he ever heard. That statement was, perhaps, too sweeping. But when you consider the kind of thing that goes on every day in the Law Courts, you will not be surprised.

In the late Mr. Montagu Williams's "Leaves of a Life" there is a story told about an expert in handwriting. This "expert," who was well known and eminent in his vocation, swore most positively that a certain postcard was in the handwriting of the prisoner. He was quite sure that the writing was a disguised hand, and equally sure that the prisoner's was that hand. Imagine

the disgust of the "expert" when there went into the witness-box a well-known City man, who said, "I wrote that postcard. It is not a disguised hand at all, but is the usual way in which I write." And he then and there, being accommodated with pen and ink, wrote down the words which appeared on the postcard.

I mention these things not by way of impugning the honesty of professional witnesses, because I have no doubt they are honest enough. I only say that their evidence is not <sup>very</sup> trustworthy because of its very nature. It is, if you come to think of it, very hard to give an absolutely impartial opinion, however much you may wish to do so. A gentleman who is requested by a railway company to visit a person who says he is suffering from the effects of an accident on their line, goes to the patient with a mind already biassed. He is prepared to find the sufferer exaggerating his aches and pains. In fact, he expects it, and consequently he listens to an account of the symptoms while continually saying to himself, "This man is exaggerating."

To hark back to the immediate subject, I know of one London magistrate who never trusts to the evidence of other people in dealing with houses said to be unfit to live in. He always goes to see for himself, and I have known him to spend many, many hours of his own time, quite beyond what he is paid for, in making these investigations. I respectfully commend his example to other magistrates.

#### DAINGEROUS STRUCTURES.

**Houses in an Unsafe Condition.**—Besides the obligations imposed by the Public Health Acts to keep houses in a sanitary condition, so that they may not injure the community by spreading disease, there is a certain amount of responsibility placed on the shoulders of the householder in respect of keeping his house in such a state that it will not be dangerous to the lives and limbs of the public. Let me first deal with **the outside condition of the premises.**

Cases of this kind happen occasionally: Miss Tarry was walking along the Strand, London, one day, past the house of Mr. Ashton, when a heavy lamp fell upon her shoulder, injuring her severely. The lamp came from just above the front door of Mr. Ashton's house, where it had hung for many years. Now it so happened that Ashton, only the week before the accident, had noticed that the lamp was in a shaky condition, and he at once sent for an experienced gasfitter to repair it. The gasfitter sent some men the next day, who spent several hours fixing the ironwork of the lamp securely into the brickwork of the house. At least, this was what they were told to do and were paid for doing, but whether they scamped the job, or whether the plaster or mortar used had not had time to dry, I do not know, but certain it is that four days after the work was done the lamp fell, as Miss Tarry's shoulder did testify. The injured lady claimed compensation for injuries inflicted upon her. She first of all went to Mr. Ashton, but that gentleman denied all responsibility. "You must go to the builder, my good woman," said he. "It is his fault that the accident happened, not mine, and to him you must look for compensation." Whereupon poor Miss Tarry repaired to the builder, who also promptly



denied liability. After this buffeting from pillar to post it began to strike the injured fair that she had better consult a solicitor, which she did, with the result that a writ was issued against Mr. Ashton. The judges decided that he was liable, even although he appeared to have done his best to put the lamp in repair.

From this example the householder may gather the extent of his responsibility for the safe condition of the outside of his house. He is responsible not merely to employ a competent man who shall contract to keep it in a state of safe repair, but he is answerable for the way in which that person does his work. In other words, if the work is not done properly and the premises are still left unsafe to passers-by, the householder will have to pay for every bit of damage that ensues.

Sometimes not only the tenant but the landlord also is liable to the person injured, and this is perhaps a good thing for that person, because the tenant of a small house is very likely to be a small man, not worth powder and shot. If you, for instance, are walking along a street composed of houses of the working class and you tread upon a cellar grating, and the grating, being rotten, gives way, causing you to break your ankle, it will not be very much use for you to demand compensation from the householder. He, a workman with a wage of from one to three pounds a week, cannot compensate you if he would, and you will only waste good money and time by bringing an action against him. In these circumstances you naturally begin to wonder if there is anyone who is able to pay, whom you can possibly make responsible for your injuries and expenses, and your thoughts turn from the occupier to the owner of the premises. Now, I warn you to be very careful how you act in such a case as this. It is just possible the landlord may be liable, but in any case this will be very difficult to prove. I will tell you why: because the owner will not be responsible unless

- (1) The grating was unsafe *when he let the house*, or
- (2) *He has agreed* with the tenant *to do the repairs*.

If the grating was unsound when the house was let to the present tenant, then the landlord is liable, as the case of *The Damaged Chapel* will show. One Flight bought a ruinous wreck of a house next door to a chapel. Presently the house tumbled down on the chapel and caused very considerable mischief. In answer to a claim made against him for compensation, Flight said, "I am under no liability; you must look to my tenant to pay you damages." This was very kind on the part of Mr. Flight, as you will perceive when I tell you that the tenant was a poor man who was not worth five pounds all told, and whose wages averaged about sixteen or seventeen shillings a week or so. "Issue your writ against my tenant," quoth Mr. Flight derisively. But the trustees of the chapel knew better than that. They brought their action against the landlord, proved that the place was in a shaky condition when it was let, and the Court decided in their favour.

To show the other side of the question, there was a case of a chimney-pot which somehow got dislodged, and fell upon a Mr. Nelson who happened to be passing along the street at the time. The injuries caused were not so

severe as might have been expected, seeing that the man was struck on the head, but they were quite severe enough to cause Mr. Nelson a great deal of pain and suffering, besides loss of time and money. An action was brought to recover compensation from the owner of the house, but Mr. Nelson was quite unable to prove that the chimney-pot was in any way defective *at the time the house was let*, nor could he prove that the landlord was under any agreement to repair. He was told, therefore, that his only redress was against the occupier of the premises.

Yet another case, to show another variation. This was trouble arising out of our old friend the cellar grating. A cellar grating is not much to look at, and to see it as it lies meekly in the pavement to be trampled under foot of men, you would never imagine what an important part it has played in legal circles. Passengers along the public streets are continually meeting with accidents from these gratings. Sometimes the grating is higher than the level of the footpath, thus causing the unwary pedestrian to trip up and fall upon his face. Sometimes the whole grating is left so loose that the next person who treads upon it goes down into a cellar at one step. Then rails get loose, and sprained ankles and broken collar-bones result. The particular cellar grating to which I am about to refer was one of the broken kind, possessing as an additional attraction a very insecure fastening. Coming home one night from the club a certain alderman strayed on the grating. It was too much for the poor thing to bear, for the said alderman was no thinner than aldermen usually are, and so the grating gave way—much to the detriment of the person of the civic dignitary. The occupier of the house not being worth the trouble of suing, the worthy alderman proceeded against the owner. The plaintiff was able to prove that at the time the house was let the grating was in an unsafe condition, but still he did not win his case. The reason was that by the agreement of tenancy between the landlord and the householder, *the householder had bound himself to repair the premises*, thus exonerating the owner from all liability. To summarise the law upon this subject:—

(1) When the premises *were let in a dangerous condition*, and the tenant has not agreed to do the repairs, the landlord is liable for any injury caused to passers-by.

(2) When the premises *were let in a dangerous condition*, but the tenant has agreed to do the repairs, the landlord is not liable.

(3) When *the landlord has agreed to do repairs*, he is liable, whether the premises were dangerous at the time they were let or have since become so.

(4) In *every* case the tenant is liable, whether the landlord is or not.

(5) So that the injured person may *always* sue the householder, and in cases (1) and (3) may sue the landlord as well.

So far, we have considered the liability of the householder for the condition of his premises as far as outsiders—that is, people in the street—are concerned. Now let us look at **his responsibility for the safety of those who come upon the premises**. Such persons may be (1) *trespassers*, or (2) *guests* and persons having a mere permission to come upon the premises, or (3) *persons there on lawful business*; and according to the category in which they come, the liability of the householder varies. The first class, **trespassers**, are not entitled



to very much consideration. As I have said, you must not set man-traps and spring-guns for them in the daytime ; neither must you dig a dangerous pit within five-and-twenty yards of a highway. If you do any of these things, and the trespasser is injured thereby, he may make you pay the damages ; but beyond this, a trespasser cannot complain if he comes on your premises and falls into or over some obstacle. He had no business there, to begin with, for you did not invite him nor permit him to come there.

**Guests, and persons having permission,** are called in law *licensees*. If a man comes to you and says, "May I walk in your garden and look at the flowers ?" and you say "Yes," a lawyer would call that giving the man a *licence* to be there. Now the position of a guest or a licensee is this : If, owing to the state of your premises he is injured, he cannot recover damages against you unless you set a trap for him. By this I do not mean that you artfully prepare a trap specially to injure that particular man or any other man, but I mean that you have something on your premises dangerous and concealed. Thus, if a guest comes to your house to pass the night, and is shown into a bedroom where there is a trap-door in the floor, opening downwards, and the trap-door is closed so as to look like the rest of the floor, but is not fastened—this is setting a trap for your guest, and if he steps on the trap-door and is precipitated through the floor, and hurt, he can hold you responsible for the consequences.

But cases where a guest can sue his host are extremely rare. A lady goes out to dinner, wearing a valuable silk dress. The servant in handing the soup spills some on the beautiful gown and spoils it. The lady has no remedy against her entertainer. Again, take the case of a gentleman who went to pay a call on a friend, and in coming away was pushing open a door, when a pane of glass fell out and cut his hand so badly as to incapacitate him from work for months. It was decided that the host was in no way liable to his guest for this injury. Suppose, again, you visit a friend who puts you into a bed of which the sheets have not been properly aired. You catch a cold or rheumatism, and are perhaps laid up for months. Nevertheless, you have no legal ground of complaint.

**Persons using the premises on lawful business** have, however, a right to protection. As far as they are concerned, it is the lawful duty of the householder to take care of them, by having his premises in a reasonably safe condition. Any neglect of this duty, if it results in injury to the "man on business," will involve serious consequences. Mind, I do not say you will *always* be liable for *every* injury which happens to a person who comes to your house and is hurt by reason of the defective state of the premises. The law does not place such a high value on the man who comes on the premises as it does on the man who is merely walking past the premises on the public street. If your chimney-pot falls on the man in the street, he can bring an action and recover damages against you, whether it is your fault or not. But if a man calling on business is inside your front gate and the chimney drops on him, you will be exonerated if you can prove that it was not your fault. You may be able to show, for instance, that you had just caused the chimney to be repaired by a competent bricklayer, and that the accident was caused by the workman using inferior mortar. Then it will be the workman's negligence, not yours.

But you are responsible if you invite a man to come to your house on business and then cause him injury by *negligently* allowing the place to be in an unsafe condition. This is the kind of thing, I mean: Mr. Dee was a householder, and one day somebody noticed an escape of gas in one of the top rooms. The plumber was communicated with, and he sent a man named Pitt to look at the gas-pipes to see if there was an escape. When the workman arrived at Mr. Dee's house, he was told to go upstairs to the second storey, and to enter the first room on the right. Proceeding up to his work, Pitt arrived at the first-floor landing in safety, and was going across the landing when he fell through an open trap-door. He successfully maintained an action for damages against the householder. Had he been a mere guest in the house, I do not think he could have claimed a penny, but because he was there on lawful business concerning the interest of both himself and the householder, he was entitled to have the place made *reasonably and properly secure*.

Mr. Price was a dealer in antiques and curiosities, who, hearing that Mr. Kant had a very curious old cabinet in his possession, dropped in one day with intent to inspect the same, and to buy it if he could. On being shown into the room where the cabinet was, Mr. Price soon discovered that the ceiling of that apartment was every whit as old and curious as the cabinet. For without warning, the said ceiling descended upon the head of the unlucky curiosity-dealer, almost killing him. After spending three months in hospital and another three months recruiting at the seaside, Mr. Price proceeded to make matters warm for Mr. Kant by issuing a writ against him. Kant argued thus: "I did not ask you to come to look at my cabinet. You came entirely of your own accord. I am not a furniture-dealer, and had not the slightest desire or intention of selling that which you wanted to buy; consequently, as far as I was concerned, you were not upon my premises on business." But this argument was of no avail, and the damages and costs that Mr. Kant had to pay amounted to something considerable. You see, Price was there on lawful business concerning himself and the householder, and it was no answer to him that the object of his visit might not have been attained. If you have a horse and I come to ask you if you will sell it, surely that is a visit for the purposes of business, whether we strike a bargain or not. You may have no intention of selling, but I may offer you such a tempting price that you will change your mind; nor does it matter one iota whether you asked me to come or not.

If the gas-man comes to inspect the meter, and as he is passing through the hall the chandelier drops on his head, you will have to pay, because he came on lawful business and you did not see to it that your house was in a reasonably safe condition.

To sum up: the *trespasser* can sue you if you damage him by man-traps and spring-guns, or by a pit dug within twenty-five yards of the road. Your *guest*, or the man on your premises with your permission but not on business, can sue you if he is hurt by anything in the nature of a concealed trap. The *man who comes on your premises upon lawful business* can sue you if he is hurt by reason of the place not being in a state of safety, so far as it lies in your power to make it safe.



## CHAPTER IV.

### THE HOUSEHOLDER AND HIS RATES.

Who invented rates?—The principle on which rates are assessed—The net annual value—How to arrive at it—Difference between rent and value—When the owner is the occupier—When the tenant has improved the premises—When values go up—Change in rateable value—How to proceed if your rates are too high—Appeal to the assessment committee—From them to Quarter Sessions—Notice of objections—Small houses and their rates—Other people's rates.

**T**HINK of the time, my readers, when England was indeed Merry England—when there were actually no rates, and consequently no rate-collectors. It seems almost too Utopian—a country where no little slips of paper are left at the door, no men heralded with loud knock announce themselves as “Rates.” But it was so. Englishmen generally think of the days of Queen Elizabeth as the golden age of their country. They call to mind that in her day Britannia for the first time ruled the waves. They remember the colonising of the first American State. They repeat with pride the great names that adorned her reign—Raleigh and Drake, Burleigh and Walsingham, and, greatest pair of all, Bacon and Shakespeare. Little wonder that even now Good Queen Bess is regarded as pre-eminent amongst English sovereigns. But does the suffering ratepayer, groaning under the burden of poor rate and police rate, lighting rate and water rate, education rate, general district rate, and all the other rates the householder is heir to, reflect how this same Good Queen Bess was the first to invent rates in England? The first of these burdens was levied in her reign, and was the poor rate. By an Act of Parliament in 1572, certain persons were to be appointed in every parish as Overseers of the Poor. The duty of these officers was to provide work for those of the unemployed who were able to labour, but either did not or could not obtain a job. Another duty was to apprentice young persons to honest employments; and a third, to provide for the maintenance of the aged and the impotent poor. And as these duties could not be performed without funds, these overseers were to cause **a rate to be levied on all occupiers** of houses and land in the parishes. Such, briefly, is the history of the poor rate, which is even now the most important of all.

Now, let me consider *the principle upon which you are, or ought to be, assessed*. We are all familiar with the phrase—“The poor rate is [     ] shillings in the pound.” In what pound? You know that assessors put you down at £30, and you have to pay some times thirty shillings. Many people have a vague kind of idea that they are over-rated. Not socially, of course; nor physically; nor mentally. It would take a good deal to make a man think that he was over-rated in any one of these respects. He not infrequently thinks the other fellow is overrated. But any man, even the most self-sufficient, may easily come to the

conclusion that he is over-rated by the overseers. Now let me set forth shortly the legal principles upon which those useful though detested functionaries ought to proceed in assessing you.

To begin with, all other rates are assessed upon the same basis as the poor rate. I mean, if you are assessed at £30 a year for poor rate, you will be assessed at £30 for all the others. The reason is historical. As I have said, the poor rate was the first to be imposed; and when others began to be levied, the local authorities naturally took as the basis of assessment the only figures then existing, that is, the poor-law assessment. Therefore, when we talk about the principle upon which rates are assessed, we simply mean the principle upon which poor rate is assessed. If we understand that, we have arrived at all the information possible on the subject. It was not until some two hundred and fifty years after the poor rate had been first established, that any clear and definite principles of assessment were set up for the whole country. From Elizabeth to William IV. almost every parish had its own method of calculation; and so uncertain was this felt to be, that at last Parliament interfered. The Act begins by stating that "it is desirable to establish one uniform mode of rating for the relief of the poor throughout England and Wales." It goes on to enact that the basis of every estimate shall be the *net annual value* of the several hereditaments rated. ("*Hereditaments*," roughly speaking, means land or houses or any interest therein.)

Now we come to the question, **what is the net annual value of your house?** Most people, I think, will say that the net annual value of a house is the rent paid for it by the tenant. As a rule this is right, because it may safely be left to the landlord and the tenant between them to see that the rent is the value of the house. The landlord will take care that the rent is not substantially less than the value, and the tenant will take care that it is not substantially more. But the word "net" must be considered. And here we come to **a difference between repairing and non-repairing leases.** When the tenant agrees to repair, the rent he pays may fairly be taken to be almost the *net annual value* of the house. But when he does not agree to repair, the rent is almost the *gross value*. To arrive at the net value, you must deduct the necessary average cost of keeping the building in repair. Thus, if you pay £40 a year and agree to do all repairs to the house, you may be rated (say) at £38, for even then a little is deducted to allow for outlay such as insurance. But if you pay £40 rent, and your landlord is liable to repair, you will, or ought to be, rated at less than £38, because to arrive at the net annual value a deduction must be made for repairs. This deduction is not what actually is spent in any one year on the house, but a sort of average calculated on what the repairing of such a house might be expected to cost.

A second case requiring consideration is **where the owner of the house is also the occupier.** Here you have no actual payment of rent to assist you in determining the annual value of the property. How, then, are you to find out the "net annual value"? The process is simply this: take the opinion of some house-agent, and ask him for how much you might expect to let such a house if the tenant paid all rates, taxes, and other outgoings,



insured it against fire, and kept it in repair. You see, the standard of value is rent; but as no rent is actually paid, it becomes a matter of simple calculation of what the net rent would be if you let to a tenant instead of occupying it yourself. In making a valuation of this kind, you must always take into account the situation and character of the house, its age, its state of repair, as well as merely the size of it.

Suppose, for instance, you have a house of eight rooms in a main thoroughfare in the West End, and another of exactly the same accommodation in Whitechapel. You receive a net rental of eighty pounds from the Whitechapel house, and live in the West End residence yourself. It will not do for you to contend that because you are rated at £80 in Whitechapel you ought to pay the same at the other end of the town, just because the houses are of the same size and have the same accommodation. It is well known that rents in fashionable thoroughfares are always high, and therefore values are high, so that you may be called upon to pay on an assessment of £150 or £200 for your own residence.

A third case, which gives rise to much heart-burning, where the net rent is not the basis of rating, is where the tenant himself has improved the property and so caused it to rise in value. The overseers in making their assessment must calculate the *present* net annual value. This principle is sometimes put in this form: the rateable value of the property is its **improved annual value**. Take such a case as this: I take a house at £30 a year, agreeing to repair and keep in repair. My lease is for a long period, say twenty-one years, and as I want to be as comfortable as possible during my stay, I begin to "do the place up," as the common saying has it. I put in, perhaps, a new front, plate-glass windows take the place of ordinary common panes, a verandah is erected over the front door. The house being an old one, there was no bathroom; I fix a bath, with hot and cold water laid on. The kitchen arrangements were of the worst kind; I cause to be fitted up a new cooking-range on the most approved modern principles. In fact, if the house were let now after my improvements, any tenant would willingly give £40 a year or even £50. For that very reason the parish overseers will put up my rates. My *rent* is £30, it is true; but the net annual *value* of the house is considerably more. If the overseers come to the conclusion that I have so improved the place that its net annual value is now £40, I shall have to pay rates on £40.

I would say, in passing, that this applies not only to a house, but to all kinds of rateable property. Shops, farms, gardens made more valuable by the tenant, are liable to be rated higher on that account. Many people think this hard. To them I would reply by a question: What else can the local authorities do?

A fourth case where the rateable value does not correspond with the actual rent, is where the tenant took a lease, and since he took it *the property has gone up or down in real value*, not owing to anything the tenant has done, but to circumstances over which he had no control. For instance, suppose in the year 1860 I had rented a house in Croydon, which was then considered outside

London. I could have hired a very fair dwelling for £25 a year. In the year 1860 I took a house in Croydon on a fifty years' lease at the rent of £25. In the year 1896 that identical house would probably let for £50, and I, therefore, shall be rated at a correspondingly higher figure. Rates being at 5s. in the £, in 1860 I should pay on about £20 ( $20 \times 5 = 100$  shillings). But in 1896, though I am paying the same rent as before, I shall be assessed at about £40 ( $40 \times 5 = 200$  shillings). I actually know of a case where a man, now eighty-four years of age, took a fair-sized cottage of about six rooms in a Lancashire village sixty years ago, when he was married. The rent was 3s. a week—a very fair rent in those days for a small agricultural village. That place has now, thanks to the enormous growth of the cotton-spinning industry, become a town of some 30,000 inhabitants. I need hardly say, perhaps, that six-roomed cottages are not now let there at 3s. a week. The landlord of the octogenarian to whom I referred has never raised the rent. He is a large landed proprietor, and makes it a rule, I am informed, never to raise the rent of any tenant. If the house increases in value, he waits until the tenant dies or gives notice to quit. But the parish authorities have not adopted the same plan, and the old gentleman's six-roomed house is now rated at £30 a year, or just about four times the amount of his rent.

It is not my concern to defend or to attack the present system of making assessments. To me it seems fair enough. The bigger a man's house, the wealthier he is—at least, that is roughly and generally the truth. The wealthier he is, the more he ought to pay, or, at any rate, the more he can afford to pay. And though sometimes comparatively poor people with large families, who are obliged to live in large houses, pay more in proportion to their means than those with smaller families and equal or greater wealth, yet one must remember that almost every law and every way of raising money for public purposes works some injustice, and the only hope of the financier and the legislator can be to reduce injustice and inequality to a working *minimum*.

I ought here to state explicitly, perhaps—though many of my readers may have inferred it already—that the principle of going behind the actual rent to find out the value cuts both ways. If your rent is lower than the net annual value, by reason of improvements, or the raising of values by other circumstances, your rateable assessment goes up. If, on the other hand, the house depreciates, your rateable value goes down. This has especially been the case in agricultural districts. Dwelling-houses in such districts in England and Wales are not of much more than half their former rateable value. Farms are even worse. The occupiers in these cases are entitled to a reduction in their assessments for rating purposes, because by a depression in the industry of the district the houses and farms are not worth, in the open market, so much as they formerly were. (For rating of farms, see Book III., c. 9.)

To recapitulate—the rateable value of a house is the **rent** which a tenant would **now** give in the open market, **deducting** from that a certain amount which the landlord has to lay out for **repairs, insurance, taxes, etc.** If the tenant agrees to repair, insure, pay rates, taxes, and other outgoings, the rent will be very nearly the annual value, so that the safest test is to ask, How



much a tenant would now give if he, in addition to his rent, were bound to defray all expenses connected with the property? The answer to this question is the answer to the question—What is the rateable value?

### Calculation of Rateable Value.

	£	s.	d.
Gross annual rent ( <i>i.e.</i> actually paid) ... ..	50	0	0
Deductions:	£	s.	d.
Annual repairs ... ..	5	0	0
Fire insurance ... ..	0	6	0
Rates and taxes payable by landlord ... ..	2	0	0
		7	6
Net annual value or rateable value	<u>£42</u>	<u>14</u>	<u>0</u>

**How to proceed if your rates are too high.**—In every district there is a committee, called the Assessment Committee, who have the power to assess the value of all the property in the district. The overseers of every parish are required by law to make a list of all rateable property in that parish, with the value of each property attached. This list must be signed by the overseers and deposited at the place where the rate-books are kept, which is usually the office of the *assistant-overseer*. The object of depositing the list in that place is to enable ratepayers to inspect it and take copies if they wish to do so.

**Objections.**—Any person who feels himself aggrieved by the valuation has a right to state his case before the Assessment Committee. Before he can do this, however, he must give notice to the committee or else to the overseers, and such a notice must be *in writing*, and delivered either to the committee or the overseers within twenty-one days after the valuation-list has been deposited at the right office. The Assessment Committee then holds a meeting, at which your objection will be heard. After you have sent in your notice of objection, you should *keep your eye on the church door*, because the overseers are bound to give notice of the committee meeting by affixing the same to the church doors. When you appear before the committee, be careful to take with you your lease or agreement, if you have one; and if you hold without any written agreement, try to get your landlord to put down in writing what the terms of your tenancy are. If you want to show that your rent is higher than the value of the property, you must be ready with some sort of facts and figures to support that view. For instance, you may have taken this house many years ago on a long lease at a rent of £50 a year. Since the date of your lease the neighbourhood has somewhat decayed, and the houses there no longer fetch the same rentals. You may be able to show the committee by comparing your rent with that of the tenements on either side of you, that though you are paying £50, if the house were to be let now, the landlord would not be able to command more than £40 for it.

One other point I wish to insist upon in connection with objecting to the overseers' valuation. The written notice of objection to which I have before alluded must always state the grounds on which you object. It will not do, for instance, to write to the overseer and say: "Take notice that I intend to object to your

valuation of my house." Sometimes Assessment Committees are not very strict, and will allow an objecting ratepayer to state his objections, even if his notice is not in a legal form. But they are not bound to do so; and if they do waive formalities, it is an act of grace and favour on their part. It is just as easy to be correct in these matters as to be out of order. No particular set form of words is required to make the notice good. I would suggest a form something like the following :—

*"To the Assessment Committee of Bigtown, in the County of Mudshire,*  
*and*

*"To the Overseers of the Parish of Stown.*

"Take notice I, John Dash, object to the valuation-list of the said parish on the following grounds :—

- "(1) That the house in my occupation is improperly assessed at the sum of £50 gross and £42 net, whereas it ought to be assessed at £40 gross and £30 net.

[Go on with other grounds, if any.]

"(Signed) JOHN DASH."

**Appeal from the Assessment Committee.**—Having been heard by the Assessment Committee, and having stated to them your reasons for thinking that you are rated at more than the true value of your house, you have not yet exhausted all your remedies. For if the committee decide against you, you may appeal from their decision. If you *look at the doors of your parish church*, you will see posted there four times a year a notice, informing all persons that a Special Session of the Justices will be held on such and such a day, to hear appeals as to the unfairness, inequality or incorrectness of the valuations passed by the committee. If you intend to challenge the committee's decision, you must do two things: first, give notice in writing at least seven days before the date of the Special Sessions to the overseers of the parish; second, give a similar notice to the Assessment Committee at least twenty-one days before the date of the Special Sessions. If you discover, from the notice on the church door, that the Special Sessions for hearing rating appeals are to be held on the 25th of April, you must give notice to the overseers on the 17th at latest and to the committee on the 3rd.

When you go before the Special Sessions, which consists of some justices of the peace for the district (J.P.'s, as they are commonly called), you can only object to your valuation on the same grounds that you did when you were before the Assessment Committee.

If you do not like the decision of the Special Sessions, you may again appeal to the Quarter Sessions. In such a case you had better employ a solicitor. Go to him **at once**; because if you intend to appeal, it must be to the next Quarter Sessions and not to any future one. And seeing that notice of appeal must again be given to the overseers and committee, it is generally essential that steps should be taken without delay.

**If you do not appeal**, the valuation-list made out by the overseers is final. It is no good to go to the rate-office and grumble. There are ways



and means provided by the law for redressing the grievance of over-assessment ; and if you don't choose to avail yourself of those ways and means, you must pay, and smile if you can. The thing I have found to be done is something like this : Mr. Householder goes home from business one day and his wife hands him a slip of paper, saying, "A man left this to-day ; he says he'll call again next week." Householder looks at the paper, throws up his hands, and says, "Good gracious, my dear, they have assessed me at £50 ! Far too much : last year it was only £40. I'll call at the rate-office in the morning." And, accordingly, in the morning he calls and sees the obliging clerk, and asks if there has not been some mistake. Whereupon the clerk assures him that there has not—there has been a fresh assessment since last year. "But I'm not going to pay this," says Mr. Householder ; "it is simply robbery." All the same, he has to pay it nine times out of ten, because the time for appealing to the Assessment Committee has gone by. I would especially advise new tenants to look up the rating of a house as soon as they take possession. It may be assessed too highly, and notice of appeal should be given at the earliest possible moment.

**Small houses and their rates.**—I have already stated that in the case of small houses, such as are usually occupied by the working classes, the owner and not the occupier is rated. This is done for two reasons : (1) because the rate is more easy to collect from the landlord than from the tenants, who are here to-day and gone to-morrow ; and (2) because the rate is more easy to assess by taking the tenement as a whole. I mean that in large towns where one tenement is often let out in pieces—one tenant occupying one room, another two rooms, and so on—as is the case especially in London, it would be very hard to say what the value of such small occupations really is. And so it is found the easiest plan to rate the whole building together, and collect the rate from the owner.

The houses for which owners have to pay rates instead of tenants are such as are let for less than three months at a rent of not more than £20 by the year. If there is a weekly or monthly tenancy at a higher rent, the occupier is bound to be rated and not the owner. Twenty pounds a year works out at £1 13s. 4d. per month, or 7s. 8½d. per week. So that if you pay as much as eight shillings (or even 7s. 9d.) a week rent, it does not matter whether you are a weekly, monthly, yearly, or any other kind of tenant. In any case, you will be on the rate books, unless, of course, your landlord offers to pay instead of you.

It is an advantage to the landlord to pay the rates of a number of houses, because he will be allowed a sort of commission, or discount, of anything up to 25 per cent., which means that instead of paying £1 he only pays 15s.

#### OTHER PEOPLE'S RATES.

It may be news to some of my readers to learn that they can appeal not only against the rating of their own premises, but also against the rating of other people's premises. This is perfectly just, for it may happen that some other people in the parish are very much under-rated, thus increasing the

burden laid on the shoulders of the rest of the ratepayers. It is the duty of those who assess the rates to deal fairly as between man and man. Should they, either through mistake, or fear, or favour, assess certain persons at less than the rateable value of their premises, any other ratepayer has the right to object, and to demand that the burden shall be put upon the shoulders of such as ought to bear it.

If you want to appeal against the manner in which any other person is rated, you must give notice to him and to the overseers of the parish that you intend to go before the Assessment Committee. This notice must be in writing, and must state the ground upon which you intend to proceed. The form of notice given above will serve for this purpose, with the necessary alteration as to the property in respect of which you intend to appeal. There is a case on record where certain parishioners were dissatisfied with the rating of three farms, which comprised the greater part of the land in that parish. The whole three farms were let together to one man, who got them cheap because he took all three. If they had been let separately, they might reasonably have been expected to let at a much higher rent. The farmer managed to persuade the overseers to assess him *at the low rent which he actually paid*—something like £400 a year less than the proper annual value. Some of the other ratepayers objected to this; and very naturally so, because it meant that this £400 had to be distributed amongst the other property in the parish. An appeal was carried up to the High Court, with the result that the farmer's rates were put up and the rest of the parish was to some extent relieved. As I have explained before, the overseers ought to have rated the farms at their annual value and not at their annual rent.



## CHAPTER V.

### THE HOUSEHOLDER AND HIS LODGER.

The legal position of a lodger—Lodgings or board and lodgings—The proper way to make a lodgings contract—Necessity for writing—Is the condition of the rooms guaranteed?—Difference between furnished and unfurnished apartments—Notice to quit—Security for the rent of lodgings—Detaining a lodger's property—The lodger's latch-key—The lodger and a distraint for rent—Protection of lodgers' goods—The safe keeping of the lodger's goods.

THE legal position of a lodger depends on *the form of agreement* by which he agrees to become and the householder agrees to accept him as a lodger. You may have, broadly speaking, two kinds of contracts. The first is where you agree to let and the lodger agrees to hire a *particular* room or particular rooms—as lawyers say, a contract for giving him the *exclusive possession* of one or more specified rooms. Or you may have a contract to supply him with lodgings, or board and lodgings; but so long as you supply him with proper sleeping accommodation your contract is fulfilled. He has *no claim to any particular room* in the house. In the first case, the lodger is a sub-tenant, and is in almost the same position to you as you are to the landlord of the house. In the second case, he is in the same position as a guest. I have occasionally seen advertisements to this effect: "Mrs. A. is desirous of receiving two ladies as paying guests in her house in a healthy London suburb. Home comforts. Cheerful society.—Apply personally or by letter to Mrs. A., 147, Blank Street, W." This description, "paying guests," defines the position with much accuracy when it is intended simply that the two ladies are to board and lodge in Mrs. A.'s house; but if they are to have the exclusive use of particular rooms, it is not accurate. The advertisement "Bedroom and sitting-room to be let on the first floor; suitable for City gentleman," accurately indicates real lodgings. For it is evidently intended that the City gentleman shall have the exclusive use and possession of the bedroom and sitting-room.

I will deal first of all with **the form in which a contract to let lodgings should be made.** I believe it is not generally known that an agreement to let what I have called real lodgings ought to be **in writing in England, but not in Scotland.** I know that I myself, in former days, have taken lodgings but never once was I asked to sign a written agreement. Let us see what are the consequences of not putting such a contract in the form of black and white. In the first place, if you have put it in proper form, and the lodger does not come into the lodging at all, he must pay you a week's rent at least. If you have not an agreement signed by him, you have no legal remedy whatever.

Another consequence is, that if he does not pay the rent, you cannot distrain upon his goods. If you have a proper written agreement you can so distrain.

A third consequence is that the lodger can leave without giving notice, and you can compel him to quit without giving him notice.

At the same time, he is bound to pay you at the agreed rate for so long as he uses his rooms. This is always the rule. When you, for instance, enter into a house without any agreement of tenancy, but with the permission of the owner you are not a tenant, properly so-called, and are not bound to pay *rent*, but you are bound to pay the landlord for having had the *use and occupation* of his property. The sum payable is a reasonable sum. Just as if I go to a livery stable (carriage-hirer, in Scotland) and say I want to hire a trap for the afternoon, and do not stipulate for any particular price, I am bound to pay the usual and ordinary rate—so a lodger, whose agreement is not in writing, must pay for the use of the rooms during the time he has actually used them, although in strict law he is not a tenant.

To sum up, the disadvantage of not having a written agreement for the letting and hiring of rooms as lodgings is that the householder loses one security for his rent, and neither party can claim notice to quit.

#### IN ENGLAND.

**The condition of the rooms.**—When you agree to let *unfurnished* rooms to a lodger, you do not guarantee them to be in an inhabitable state. That is, I mean, unless you expressly do it. If, for instance, the would-be lodger asks if the drains are all right, or if the room is dry, and so on, and you answer in the affirmative, you will be taken to guarantee the truth of your statements. Should it turn out that the rooms are damp, or that the drains are in a bad state, the lodger can throw up his contract at once, and leave without giving notice or paying rent. But if nothing is said on the subject before the rooms are let, the lodger has no legal ground of complaint. He can only give you notice of his intention to quit as soon as possible.

With *furnished* rooms it is otherwise. In that case the lodging-house keeper does guarantee that the rooms are fit to live in; and so, if the bedroom is infested with offensive insects, or there are smells arising from defective drainage or imperfect sanitary arrangements, the lodger is quite justified in taking up his luggage and walking out of the house without paying a farthing. And if he has paid any rent in advance, he may demand its return without any deduction being made for rent.

#### IN SCOTLAND

a different rule prevails. There is no distinction drawn between furnished and unfurnished lodgings, but in both cases the landlord warrants or guarantees that they are reasonably and properly fit to live in.

There is another thing to be noticed, namely, that

#### IN ENGLAND,

even if the rooms are let furnished and are in habitable condition when they are let, there is no obligation on the part of the lodging-house keeper to sustain them in that condition. If, then, the rooms hired by the lodger become for some reason uninhabitable after he has hired them, he can do nothing but



pay his rent for the current period—the week or month, as the case may be—then give notice to quit, pay for the time during which the notice has to run, and clear out.

#### IN SCOTLAND,

again, a different rule is enforced. As I had occasion to remark when dealing with the Householder and his Landlord, if, through no fault of a tenant, that which he has hired becomes practically useless to him, he is not bound to go on paying for it. Mind, I say through no fault of the tenant. That is an essential part of the rule, for if the tenant or lodger himself makes his place unfit to live in, he cannot expect his landlord to bear the loss.

**Notice to Quit.**—The rights and liabilities of the lodger are not very clear on many matters. Strange to say, those which are clear are either altogether unknown to or absolutely misconceived by the parties most concerned. There are hundreds if not thousands of lodging-house keepers in London who make a living at the business. Put this question to each one of them—"If I come to you and hire your first-floor back at ten shillings a week, and nothing is said about notice to leave, how much notice must I give you?" I will go bail that out of the whole multitude not a dozen but will answer wrong. In fact, I very much doubt if a single one would answer right. And you might put a question to the same effect to all the lodgers with very much the same result.

The answer received would be, "A week's notice," and you might even be laughed at for the ignorance by which the question was prompted. Nevertheless, you would not be any more ignorant than those who gave the answer. It is not the law of England nor of Scotland that a weekly lodger is bound to give a week's notice to quit. The actual state of the law was well put by the late Sir James Parke, afterwards Lord Wensleydale, one of the most celebrated English lawyers of the nineteenth century. "A tenant," he said, "who enters upon a fresh week may be bound to continue *until the expiration of that week*, or to pay the week's rent, but *this is a very different thing from giving a week's notice to quit*. The proposition contended for is this—that if a tenant commences a new week without giving notice, he is to be considered as contracting to hold not only for that week, but also for the following week. I am of opinion that in point of law *a week's notice to quit is not implied* as a part of the contract in the case of an ordinary weekly taking."

His lordship intended to rebut the idea that if A hires a room by the week beginning on Monday, he can only give notice to quit on a Monday, to expire the following Monday. Is it the law, then, that a weekly lodger can leave without any notice at all? By no means. The law obliges him to give a *reasonable* notice. Two days would be sufficient, I think. Three days would be ample. Suppose, for instance, that I hire a bedroom and sitting-room from you at a pound a week from Monday. I can give you notice on Friday that I shall quit on the following Monday. Or I can give you notice on the following Monday that I shall quit on Thursday. But if I enter upon a week without giving you notice, I am obliged to remain or pay the rent for the whole of that week. Thus, though I can give notice on Monday to quit on Thursday,

or notice on Friday to quit on Monday, I cannot give you notice on Tuesday to quit on Friday or Saturday, because by entering on that week without giving notice I have taken the rooms for the whole of that week. The sum and substance of it is that a weekly lodger may quit at two or three days' notice, but the notice must either be given at the beginning of the week or expire at the end of it.

A *monthly lodger*, in the same way, need not give a month's notice. It is sufficient IN ENGLAND if he gives a *reasonable* notice, and IN SCOTLAND *ten days'* notice. In Scotland the notice must expire at the end of a month. In England it must either expire at the end or begin at the beginning of the period. The same reasoning applies to the case of a monthly lodger as to that of a weekly one.

Most lodgings are let either by the week or by the month, but I have heard of them being taken by the quarter. A **quarterly lodger** does not stand on the same footing as a lodger by the week or by the month, for such a one is bound to give a whole quarter's notice. That is, in England. IN SCOTLAND he must give a month's notice, to expire at the end of the quarter. If you compare the rules of Scots law in the case of weekly, monthly, and quarterly lodgers, you will see that they are uniform. The principle is that the notice must be one-third of the whole period. This works out at three days for a weekly, ten days for a monthly, and one month for a quarterly lodger.

**The lodging-house keeper's security for his rent** is a subject upon which as much haziness, or rather as much undiluted ignorance, exists as on the subject of the lodger's notice to quit. There is a difference between these rights according as the tenant is a lodger who simply rents certain rooms, or as he is a boarder, or paying guest, who pays so much for board and lodgings. I have explained, in the chapter on the Householder and his Landlord, what the right of distress for rent is. I now say that the householder has the same **right to distrain upon his lodger** as the landlord has to distrain upon his tenant. In fact, in the eye of the law, there is no difference between the two cases. But **this does not apply to the boarder**, or paying guest; and I will tell you why. He pays a sum per week or per month, as the case may be, for everything, food included. In the proper sense of the word he does not pay rent at all. Now distress can only be applied to rent. You cannot distrain for the price of food. So that unless there is one separate charge for rooms, which must be certain specified rooms, you cannot distrain on your lodger's goods. If I, for instance, hire a bedroom and sitting-room, furnished or unfurnished, and take my meals out, my landlord or landlady can distrain for the rent. Again, if I pay so much a week for the exclusive use of particular rooms, and my landlady supplies me with food for which a separate charge is made, she may distrain for my rent, but she cannot distrain for the price of the food. Her only way of getting that is to bring an action against me in one of the Courts.

In the third case, where I pay, say, a pound a week for board and lodging, she cannot distrain at all, because there is no sum which can be called rent. She can only take action against me in one of the Courts.

In these cases where I do pay rent, what can the landlady of the lodgings



seize? To begin with, she must distrain in the same way as an ordinary landlord—that is, in England she must either distrain herself or employ a certificated broker; and in Scotland she must obtain a sequestration order from the Sheriff's Court. Then she can only take such goods as her landlord could take from her. *Tools of my trade, business books, bedding to the value of £5*, and the other articles mentioned on pages 143—145, she must leave untouched. A landlady who wishes to distrain on her lodger will do well to put the matter in the hands of a competent broker in England or factor in Scotland. It is a ticklish business, and she may very easily go wrong. The very day on which I write this, I heard a case in the London Courts in which an estimable lady had to pay £20 damages for taking the law into her own hands. Rent was due to her, and she could have distrained. But in trying to do it herself she overstepped the legal boundary, with the consequences I have stated.

There is another point on which I desire to give a word of warning to those householders who carry on the lodging-house business. These be chiefly of the gentler sex—widows, very often—and for rough-and-ready notions of law, commend me to a lady. I do not desire to say a word against landladies as a class. I have passed through the hands of more than one. Some there were who harboured cats: strange, but wonderfully intelligent animals, with a keen instinct for the best cut off the joint, and great sagacity in smelling out marmalade and other confections. I had reason to believe that one animal of my acquaintance possessed a duplicate key of my provision cupboard, with which it used to lock and unlock the said cupboard with felonious intent. But these were merely playful eccentricities, and I have no hesitation in bearing testimony to the cheerfulness and other most excellent qualities of the London landlady. She has, as one of the sisterhood once confided to me, “a lot to put up with,” and when I hear a young man complaining of his landlady, I often think I should like to hear the landlady's account of her lodger.

Excellent and necessary as these good ladies are, however, their notions of their rights are somewhat quaint. It is nothing unusual, if a lodger is in arrear with his payments, and gives or receives notice to quit, for the landlady to *detain his goods and chattels*. She seizes his trunks and boxes, his clothes and books, his little knick-knacks (I heard of one who took a favourite pipe—how *could* she!) and holds them as a kind of pledge. I should not dwell so long on this matter were it not one of almost daily occurrence. I want to state as emphatically as possible that for **a landlady to detain her lodger's property** as security for rent or board in arrear is absolutely and entirely illegal. She may or may not have the right to distrain—that depends on the considerations set forth in this and the preceding page—but she certainly never has a right to hold property in pawn—especially wearing apparel and such like. She only renders herself liable to an action for damages for detaining them. Least of all may she sell them. By so doing she becomes liable to the owner for their value, and for any damage he may have sustained by their being detained. I know of a case where a poor widow who let lodgings had to pay £30 for a thing of this kind. It was very hard on her, because she had acted wholly in ignorance, and her lodger was a precious scamp who had treated her very ungratefully. Ignorance of the law,

however, as I told you in the Introduction, is no excuse for an illegal act, and so the unfortunate landlady found to her cost.

**Can a lodger claim to have a latch-key, and to come and go at whatever hours he pleases?**—This is a point of controversy frequently arising. If the lodger is one of those whom I have called paying guests, he must conform to the rules of the establishment; nor can he claim the right of coming and going at unreasonable hours. But if he is a lodger who hires certain special rooms, he is entitled to come and go whenever he pleases. It is not in the power of the lodging-house keeper to say, "I shall lock the door at midnight," or at any other hour, for this would be much the same as if a landlord objected to a householder stopping out late. I do not say that the lodger may demand a latch-key; but he may demand facilities for going in and out when he wishes to do so.

**When the lodging-house keeper's landlord distrains for rent,** what is the lodger to do? I have already explained that a landlord has the power to seize, with a few exceptions, anything he can find on the premises, no matter to whom belonging. Until a comparatively few years ago he might take any furniture or other property belonging to lodgers. But the law has been altered, and the lodger has been placed in a much better position than he used to be. What happens is this: the broker's men take possession of all the goods they can lay their hands on, including the lodger's. Then, if the lodger likes, he may claim what is his own.

- (1) He must make his claim *in writing within five days.*
- (2) The writing must contain *a list of everything* he claims to be his.
- (3) It must state *whether the lodger owes any rent*, and if so, how much.
- (4) The writing and list of things claimed must *both be signed.*
- (5) If any such rent is owing, the lodger must *tender* it to the person who makes the distress.

This law DOES NOT APPLY TO SCOTLAND.

The following is a simple and effective form of the notice required to be served by a lodger who claims protection for his goods:—

*To Mr. Bones* [the landlord making the distress].—Take notice that the goods in the following list are not in any way the property of your tenant, but belong to me. I owe one week's rent for my lodgings—namely, ten shillings.

(Signed) TOM JONES.

*List of Goods.*

One walnut-frame cottage piano.  
One mahogany study table.  
One hat-box.  
One portmanteau (black leather).  
Twenty books.  
One inkstand (brass).

[And so on with the whole list.]

(Signed) TOM JONES.

**Who can claim this protection?**—Cases have arisen in which people for whom the Lodgers' Goods Protection Act was never intended have tried to take advantage of it. The Act was only meant to protect real, *bonâ-fide* lodgers. Who are they? Well, in the first place, a person who does not



sleep on the premises is not a lodger. For instance, if I hire an unfurnished office in the City from another man who hires the whole building from the owner, I am a sub-tenant, but not a lodger. Personally, I should never have thought that anyone who hired an office, which he used for business purposes only, could claim to be a lodger there. But a person did once make such a claim, and therefore I deal with it, so that no reader of the *Family Lawyer* may ever fall into a similar mistake.

**How to claim the protection of the Act.**—As I said, the lodger must first give the notice in writing with a list of his goods, and tender to the superior landlord or his bailiff whatever he (the lodger) owes to his own landlord for rent. If the furniture or other goods are not immediately restored, go at once to the police-court of the district and lay your complaint before a magistrate. A summons will be issued at once, and if the magistrate decides that the goods are yours, he will order them to be delivered up to you at once, and he will order your landlord's landlord to pay the costs of the summons.

#### IN SCOTLAND

the landlord of the house has no right over the furniture or other goods of a lodger as security for rent owing by the tenant of the house. I mean, that if A lets a house to B, and B lets one room in it to C, who furnishes the room himself, A has no right whatever to seize the goods belonging to C, if B does not pay his rent.

**When the lodger's property goes a-missing,** he not infrequently lets the landlady hear about it, and sometimes accuses her of carelessness. Let me show what I mean. A friend of mine who was in lodgings, always hung his overcoat and hat on the hatstand in the hall of the house, which was in a busy London thoroughfare. One day he hung his coat and hat in the usual place, and on going to look for them a few hours later, found them gone. Another overcoat of his had also disappeared. Search was diligently made, but no trace of the missing clothes was forthcoming. Subsequent cross-examination of the landlady revealed the fact that she had "popped out" for a minute or two to a shop round the corner, leaving the door ajar. In those few moments it is easy to see what happened. An expert lobby thief, seeing the door ajar, nimbly slipped in, gathered an armful of coats, and made off. My friend was in a rage, and asked me whether he had any remedy. He was particularly wroth because in the first place both coats were new, and in the second, the pockets of one contained some important papers. But I could administer no legal consolation. There was, I told my ill-used friend, no cause of action against the landlady—none whatever. Neither would there have been any remedy if the coats had been stolen by a fellow-lodger or a servant. It is different at an inn. An innkeeper is bound to protect the goods of his guests, and if they go a-missing, no matter by whose fault, he must pay their value.

There was a curious case once of a lodging-house keeper whose tenant was under notice to quit. The usual card was put in the window: "Lodgings for a single gentleman." The card had not long been displayed before a gentleman, presumably single, and of engaging manners, called to make inquiries. He cheerfully acceded to the request of the landlady that he should be shown over the

apartments. When in the bedroom he went to the water bottle as if to help himself to a drink. Unfortunately, the bottle was empty ; but the obliging *cicerone* offered to fetch him one. The polite stranger begged her not to trouble, but she insisted. Not three minutes did it take to fulfil the little errand of courtesy ; quite long enough, however, for the polite stranger to open several drawers and convey the most portable of their contents into a bag that he conveniently carried. The landlady returning, the single gentleman drained the glass, expressed himself satisfied with the rooms, as indeed he had reason to be, and paid a deposit of five shillings. Then he took his departure ; nor was he ever seen in those parts again. When the lodger came home and discovered his loss, he first abused the landlady, and afterwards brought an action in which he claimed against the landlady's husband the value of the stolen property. But the judges would not listen to him. They said that the only case in which he would have an action, would be *if the landlady herself had annexed his goods, or if she had damaged them. Mere negligence in leaving the room and its contents at the mercy of a perfect stranger did not make the keeper of the lodgings responsible for the theft.*



## CHAPTER VI.

### THE HOUSEHOLDER AND HIS FURNITURE.

Furnishing—Hire-and-purchase agreements—Usual form of agreement—How it favours the seller—Not bound to call for the money—The Story of the Seamstress and the sewing-machine—How you may lose both goods and money—Selling the goods—The piano that was nearly paid for—What happens if you are behind in your rent, or in debt—Removal of the goods—A Model hire-and-purchase scheme—Concluding advice.

BY furniture I mean practically everything that is used for ornament and convenience in the house, from the piano to the mangle and from the mahogany sideboard to the sewing-machine. There are several ways of furnishing. There is the magnificent way, such as obtains when Miss de Vere becomes Mrs. Cutterdash, and she and young Cutterdash go to the establishment of Thimgamy & Co., and select a suite upholstered in this fashion for the dining-room, and a suite upholstered in that fashion for the drawing-room, and Chippendale tables and Oriental knick-knacks, and Turkey carpets here and Axminsters there, and luxurious chairs for his smoke-rooms and rare and costly trifles for her boudoir. And they order the bowing shopman to send the men up to 50, Harley Square, Belgravia, and have the place ready in a month. And Mr. Cutterdash's cheque settles the account.

A different style of furnishing is that of young Easel, the struggling artist, who, being about to marry a beautiful maiden whose face is her only fortune, runs about for months to auction sales, picking up bargains. A third style is that of Mr. and Mrs. Smith, who are neither magnificent nor Bohemian, but just quiet, honest folk without a superfluity of wealth, but industrious and affectionate, and unwilling to go beyond their means. Mr. Smith has a little money laid by, enough to buy almost all the furniture, but not quite enough to furnish the modest suburban dwelling throughout. The young couple accordingly make up their minds to buy a piano on the **hire-and-purchase system**. It is to this system that I would draw their attention, with intent to show them what are the legal bearings of it. The essential parts of an agreement for hire-and-purchase are :—

(a) That the thing bought is to be *paid for by instalments* stretching over a period of three years.

(b) That until *all* the instalments are paid, the article does not become the property of the hirer.

(c) That if any instalment is in *arrear*, the piano dealer has the right to take away the piano.

- An Agreement** made the tenth day of June one thousand eight hundred and ninety eight. Between John Brown of 2 Castle Street Kidderminster House Furnisher and Upholsterer (hereinafter called "the Owner") of the one part and Cornelius Alfred Simmons of 15 Colmore Road Kidderminster Carpet Dyer (hereinafter called "the Hirer") of the other part. Whereby the parties hereto mutually agree as follows
- 1 The Owner agrees to let to the Hirer and the Hirer to take on hire from the Owner the household furniture specified and described in the Schedule hereto and hereinafter called "the said effects"
  - 2 The said effects shall be taken to be of the value of Twenty-four pounds
  - 3 The Hirer shall pay to the Owner as and by way of hire for the said effects the sum of thirteen shillings and four pence a month such sum to be payable on the first day of every month beginning on the first day of July one thousand eight hundred and ninety eight and so on from month to month until the sum of Twenty-four pounds has been paid
  - 4 The Hirer may at any time pay all or any of the instalments in advance and in case he shall exercise this option may deduct discount at the rate of Five pounds per centum per annum
  - 5 During the hiring the Hirer shall take all proper care of the said effects and shall keep the same in good condition and shall insure and keep insured the same in their full value against loss or damage by fire and shall produce the last premium receipt (if required to do so) to the Owner at all reasonable times and the Hirer shall not without the consent of the Owner part with the possession of the said effects or remove them



from 15 Colmore Road aforesaid (but such consent shall not be unreasonably withheld) and the Hirer shall punctually pay all rent rates and taxes due in respect of the premises where the said effects may be and shall produce the receipts therefor (if required to do so) to the Owner at all reasonable times

- 6 In case the Hirer shall during the continuance of this agreement do or suffer any of the following things
- (a) Fail to pay any hiring instalment within twenty-one days after the same shall have become due and after two clear days' notice in writing shall have been given by the Owner of such failure to pay
  - (b) Become Bankrupt or insolvent or compound with his Creditors
  - (c) Execute a Bill of Sale
  - (d) Do or suffer any act or thing in consequence of which the said effects or any of them would be liable to be distrained seized or taken in execution under any legal process
  - (e) Break or fail to perform or observe any condition contained in Clause 5 thereof

then and in any such case the Owner may enter into any house or place where the said effects or any of them may then be and take possession and remove them or any part of them and all hiring instalments previously paid hereunder shall be absolutely forfeited to the Owner but the Hirer shall not be liable for any future instalments **Provided always** that if at the time of such retaking of possession or seizure by the Owner the Hirer shall have paid instalments amounting in all to Ten pounds or more the Owner shall repay to the Hirer one-fifth of the amount so paid by the Hirer and if the Hirer shall have paid instalments amounting to not less than Twenty

pounds the Owner shall repay to the Hirer one third of the amount so paid by the Hirer

- 7 Upon payment by the Hirer to the Owner of the full sum of Twenty-four pounds by instalments as aforesaid or by anticipation as hereinbefore provided this agreement shall cease and determine and the said effects shall become and be the property of the Hirer but until such sum shall have been paid the said effects shall remain the absolute property of the Owner

As witness our hands the day and year first-  
heretofore written

Signed by the said John Brown and } John Brown  
Cornelius Alfred Timmins in the presence of } Cornelius A. Timmins  
Frederick Short, 12 Holford Street.  
Walsall, Sadler

### The Schedule above referred to

One dining-room suite stained Mahogany in American Leather consisting of:-

- 5 Small Chairs
- 1 Arm ditto
- 1 Table
- 1 Sideboard

Two occasional chairs stained walnut in velvet plush

One occasional Table - Rosewood

Brass fender and set fireirons. 5 pieces



June 10, 1898

Mr. C. A. Simmons

to

Mr. John Brown

Wife and Purchase Agreement

of

Household Furniture

(d) That if the piano is taken away, all the instalments which have been paid on it are forfeited.

The form of such an agreement is generally after this fashion (*for a suite value £24*):—

1. The owner agrees to let to the hirer, and the hirer agrees to take on hire from the owner, the household furniture mentioned in the schedule hereto.

2. The hirer shall pay to the owner for the hire of the furniture the sum of 13s. 4d. per month, on the first day of every month, until the sum of £24 shall have been paid.

3. During the hiring, the hirer shall take all proper care of the furniture, and shall keep it in good condition and a good state of repair, and will keep it insured in its full value, and will at all times on demand produce to the owner the policy of insurance and receipts for premiums, and in default the owner may make and keep up such insurance, and all moneys so expended by him shall be repaid to him by the hirer.

4. The hirer shall not, without the consent of the owner, remove the furniture, or part with the possession of, or assign, transfer or underlet the same to any person whatsoever.

5. In case the hirer shall do any of the following acts or things:—

(a) Fail to pay any of the hiring instalments within two days after the same shall have become due;

(b) Become bankrupt, or compound with his creditors;

(c) Execute a bill of sale;

(d) Do or suffer any act or thing whereby or in consequence of which the furniture may be distrained, seized, or taken in execution;

(e) Or break or fail to perform or observe any condition on his part herein contained;

Then the owner may enter into any house or place where the said furniture may be, and seize, remove, and retake possession of the furniture or any part thereof, and put an end to this agreement.

6. Upon payment by the hirer to the owner of the full sum of £24 by instalments as aforesaid, this agreement shall be deemed completed, and the furniture shall become the property of the hirer; but until the whole of the said sum shall have been paid the furniture shall remain the sole and absolute property of the owner, and in the meantime is only let on hire to the hirer; and all instalments paid as aforesaid shall be considered as having been paid for hire alone, and not as part of the purchase-money of the furniture, until the whole sum of £24 has been paid.

#### *Schedule.*

6 chairs	}	all walnut, and upholstered in crimson plush.
2 armchairs		
1 couch		
small table		

I shall not attempt to advise those about to become householders on the advisability (commercially speaking) of buying furniture on the hire-and-purchase



system. It stands to reason that you pay more for the goods that way than you do if you buy for cash. But it might be useful if I pointed out clearly the legal position. In the first place, this kind of agreement is **very much in favour of the tradesman**, and very stringently against the hirer. I suppose it is bound to be made strict, because there are always rogues in plenty who would be quite ready to procure goods in this way, then sell them, and make a moonlight flitting of it. That, no doubt, is the reason why the owner of the goods reserves to himself the power to seize them on very slight provocation.

There are several matters I want to draw your attention to. The first is, that if you do not pay the instalment on the proper day, the furniture can be seized and all your instalments forfeited. **And the tradesman is not bound to call for the money.** I deem it my duty to print this in large type, for reasons that I will disclose.

#### THE STORY OF THE SEWING-MACHINE.

In a certain town in Great Britain there lived a poor woman, a seamstress, who with difficulty contrived to make both ends meet. A year or two ago, she discovered that her trade was falling off. People were not willing to pay for hand-sewn garments, or, rather, those sewn by machines could be made so much quicker that the *bonâ-fide* seamstress was unable to compete on remunerative terms. One day a smooth-spoken man came to the door and offered to sell a sewing-machine. The poor woman admitted that she wanted such an article more than she wanted any other mortal thing, but—the price.

The canvasser laughed. The price! Oh, that could easily be arranged. He would let her have a £5 machine to be paid for at two-and-sixpence a week. The seamstress, delighted, consented to become a purchaser, and the very next day there was delivered at her door a brand-new sewing-machine with the very latest improvements. Soon afterwards, the canvasser also put in an appearance, and this time he produced a little book, in which, he said, the payment of all instalments was to be registered, and he told the woman to sign her name in it. She did so without a question; and, as you may guess, on the page at the foot of which she appended her name was printed a hire-and-purchase agreement. So our needle-woman became the hirer—not the purchaser—of a sewing-machine, which would become her property when she had paid forty half-crowns, but not before.

For twenty weeks, according to the documents before me, the canvasser called regularly, every Monday afternoon, and received his half-crown. On the twenty-first Monday he did not call; but the honest woman saved the half-crown for the next week, and when he then called, she paid him for two weeks. After that, the man came as usual, and was always paid regularly, until thirty-five instalments had been satisfied. And now comes an extraordinary story. On the thirty-sixth Monday, the half-crown was, as usual, in the jar on the mantelpiece, waiting the arrival of the canvasser; and the hard-working machinist felt pleased to think that there would be only four more to pay after that. **No canvasser called that Monday.**

But on Tuesday morning two men appeared with a light van. "Does Mrs. So-and-so live here?" "Yes." And without another word, the two men walked in, seized the sewing-machine, walked out with it, and drove away. The poor

woman was stricken dumb with amazement, and only found her tongue when the van was almost out of sight. Then her powers of speech returned to her with a vengeance, and the clamour brought the neighbours round. There could be no doubt of the identity of the men, because the van aforesaid bore in large letters the name of the sewing-machine firm, and all the ladies of the neighbourhood, in the debate that ensued, came to the conclusion that the machine had been seized because of the one instalment in arrear.

They also came to the conclusion that the action of the two men was illegal, and that they and their employers should be brought to book. One of the ladies who assisted in this conclave happened to be the charwoman who cleaned the offices of a friend of mine, a solicitor, and she advised the injured seamstress to go at once to this legal gentleman and see what he could do. This advice met with the general approval, and so my friend received a visit from about a dozen women, headed by his charwoman. Each of them wanted to give her account of the transaction; but as none of them except the injured one herself had seen anything at all, they did not carry the case very far.

However, the man of red tape and six-and-eightpence elicited enough information to enable him to write to the sewing-machine people, stating that the machine had been seized, that the instalment had been ready for the collector on the usual day, but he had not called for it. There must, he (the solicitor) supposed, be some unfortunate mistake, which would be at once rectified. In reply, the machine-sellers said that they begged to enclose a copy of the agreement, by which it would be seen that *they were not in any way bound to call for any instalment*; and as it seemed to be admitted that one payment was in arrear, the seamstress had nothing to complain about.

And then it dawned on my friend that this was a system of downright deliberate fraud. Unfortunately, as far as the poor seamstress was concerned, the legal position of the machine-people was apparently unassailable. It is the rule of law that if a man owes you money he must seek you and pay you. A creditor is not bound to run after his debtor. Therefore, by strict law, the hirer of this sewing-machine ought to have gone to the office of the owners every Monday and paid her two-and-sixpence.

In the particular case I speak of, the solicitor felt so indignant that he wrote straight off to his opponents, saying that after reading their letter he gave them forty-eight hours wherein to restore the machine and to pay some compensation to the seamstress, who had been unable to do any work when deprived of her tools. My friend added that unless this were done, he should sue them in the County Court, and brief counsel to let a little light into their business methods. They surrendered unconditionally after that. Light was the thing they dreaded most.

What I want to impress on you, however, is this: First, you have no property in goods taken on the hire-and-purchase system until the last half-penny is paid; second, if one payment is overdue, you lose every penny you have paid. Even if you agree to pay thirty-six instalments, and pay thirty-five punctually and miss the last one by a single day, your furniture can be taken



away and your instalments forfeited. And third, remember that even if the owner has called for and collected all instalments up to date, he is not bound to call for the others, unless he specially agreed to do so. Therefore, if the collector does not come at the usual hour, put on your hat and go to the owner's shop and pay. I don't by any means say that all persons who sell goods on the hire-and-purchase system are like unto those sewing-machine people; but it is well to be on the safe side.

**It is illegal to do what very often has been done**, and, I daresay, will very often be done again, notwithstanding my warning. But I shall give the warning, to the end that they who are wise may take heed. The illegal act against which I warn you is that of dealing with furniture on hire under a hire-and-purchase agreement. It is very hard to convince the average man, and still harder the average woman, that when such furniture is nearly paid for there is anything to prevent the hirer from selling it or exchanging it. If you were to remonstrate with him upon his intention to do either of these things, or tell him after the event that he had done an illegal act for which he would have to pay dearly, he will probably reply: "My dear sir, there's only another fifteen shillings owing on the stuff, and that isn't due till next Monday, and I shall pay up when the collector calls."

That is all very well; but if the furniture-dealer finds out about this transaction, he can place the hirer in a very awkward position. Let me say again, at the risk of wearisome reiteration, that until you have paid the last farthing of the agreed amount, the furniture belongs to the furniture-dealer and not to you. That is the whole essence of the hire-and-purchase system. Consequently, you had no more right to sell that furniture than you would have had to go into my house, borrow my watch, and sell it. In the latter case, you would be adjudged liable to pay me the full value of the watch; and in the case of selling hire-and-purchase furniture, you would have to pay the furniture-dealer *the full value* of the furniture sold. Understand, not the amount of the unpaid instalments, but the full value of the furniture at the time you sold it.

An instance which occurred in my own experience, a type of what happens nearly every day of the week, will best illustrate my meaning. Mr. Okay took a piano on a three years' hire-and-purchase agreement at 15s. a month—that is, £27 spread over three years on the usual terms. When he had paid £19 10s., Mr. Okay discovered that he had no further use for the piano, and so he took it to an auction room, where he sold it for £17. The next time the piano company's collector called for the instalment he asked to be allowed to see the instrument, and when he was told that it was gone, he informed his employers, who brought an action against Mr. Okay for £27. That gentleman offered to pay the £7 10s. still remaining due, but the offer was not accepted. The County Court judge who tried the case awarded to the plaintiffs the sum of £20, that being the value of the piano *on the day that Mr. Okay sold it*. This was rather hard on that unfortunate man, for it meant that he paid £39 10s. for a piano originally worth £27, and sold by him for £17—a dead loss of £22 10s. The County Court judge expressed his regret

that the law left him no option but to decide in the way he did. But he could not help it, because the agreement was plain that until the last instalment was paid the piano remained the property of the piano company. His honour, with a shake of his judicial head at human folly, said, "If people will make these agreements, I cannot help it. There is nothing illegal in an agreement of this kind, and therefore I am bound to enforce it, whatever may be the consequences to this defendant, who, I am convinced, had no dishonest intention, and had no idea of the consequences of his act."

Another warning let me give to hirers. It is a usual clause in hire-and-purchase agreements, as set forth in a preceding page, that in case the hirer shall "do or suffer any act or thing whereby or in consequence of which the furniture may be *distraigned, seized, or taken in execution*," the owner may retake possession and put an end to the agreement. Put into plain English, this means that if the furniture-dealer finds out that you are behind with your rent, he may come and take his goods back, because you have done or suffered something in consequence of which the goods are liable to be *distraigned*. If he hears that someone has brought an action against you and has recovered judgment, again he can seize his goods, because you have suffered something whereby the goods may be liable to be *taken in execution*. The same if you have not paid your rates and have been summoned for them. In all these cases, if the furniture man exercises his right to retake possession, you will lose everything you have paid under the agreement.

Another clause usually inserted, to which I would direct your attention, is the one which prohibits the hirer **removing the furniture** without the consent of the owner. I will not say that this clause is unfair, because it is important for the furniture-dealer to know if the goods are going to be removed. Otherwise he might run two very considerable risks. The first is from dishonest hirers, who might flit by moonlight and give him no end of trouble to discover their whereabouts. The second is from people who might remove to a distant part of the country, or even to a foreign land, in which case the furniture man would lose to some extent his control over the goods. But although this clause is necessary, for the reasons I have pointed out, it is sometimes taken advantage of by unscrupulous tradesmen who apply it to circumstances to which it was never meant, in fairness, to apply.

It frequently happens that a hirer moves, say, into the next street. He has no intention of evading payment, but he has not asked the permission of the owner of the furniture. I want you to understand that in such a case *your removal is a breach of the contract*, and from a legal point of view it does not matter two pins whether your intentions were good, bad, or indifferent.

#### A MODEL HIRE-AND-PURCHASE SCHEME.

If I were about to furnish, or buy a piano, or sewing-machine, or what not, on the hire-and-purchase system, I should take very good care not to enter into any such agreement as the one I have described. I know it is the usual form, and that is why I have explained it so fully.

The kind of agreement I should try to make would be this :—



(1) If the goods are retaken by the owner, part of the instalments already paid to be repaid to the hirer—say, one-half, deducting any damage done beyond reasonable wear and tear.

(2) As to removal, I should insert a clause like this: "The hirer shall not remove the goods without the consent of the owner, which consent shall not be unreasonably withheld."

I cannot see that any really respectable, honest trader would object to an agreement on these lines. It would afford him all reasonable protection, and it would certainly be much fairer to the hirer, who may now, under the ordinary agreement, find himself through a merely temporary embarrassment deprived of goods for which he has paid almost the full value. Let all readers of the *Family Lawyer*, when they contemplate entering into a hire-and-purchase agreement, endeavour to make it on the lines I suggest. If the trader will not agree, take the advice given by *Punch* to those about to marry—"DON'T."

## Book III.

# THE LAW OF THE BUSINESS MAN.

## CHAPTER I.

### AGREEMENTS AND CONTRACTS GENERALLY.

*Section i.*—THINGS ESSENTIAL TO ALL VALID CONTRACTS.

*Section ii.*—THINGS THAT MUST BE ABSENT.

*Section iii.*—CONTRACTS REQUIRED TO BE IN WRITING.

*Section iv.*—PERSONS WHOSE ABILITY TO CONTRACT IS PECULIAR.

*Section v.*—CONDITIONS IN AND OF CONTRACTS.

*Section vi.*—WHEN CONTRACTS ARE BROKEN AND THE CONSEQUENCES THEREOF.

*Section vii.*—WHEN CONTRACTS ARE PUT AN END TO.

*Section viii.*—FOREIGN CONTRACTS AND CONTRACTS WITH FOREIGNERS.

*Section ix.*—STAMPS.

### SECTION I.

#### THINGS ESSENTIAL TO ALL VALID CONTRACTS.

Two sides to a bargain—What is consent—Offer and acceptance: true and false—You cannot half accept an offer—You must agree on the same thing—The two *Poorlesses*—What you say you mean—Nothing must be left indefinite—The disadvantage of vagueness—Referring it to a third party—Communication of the common intention—By act—By word—Not by silence—The proper way to accept an offer—Contract through the post—When letters miscarry—Cancelling an offer through the post—Revoking an offer—When too late—You cannot withdraw an acceptance—How to gain time—Making an offer by act or conduct—Accepting by act or conduct—Offer by advertisement—Fraud—Mistake—Misrepresentation—Force—Fear—Contemplating legal consequences—Difference between Scots and English law—Valuable consideration—Compromises—Compositions with creditors—Valuable consideration must not be a past benefit—Contract by deed—When a deed is necessary—Contracts by Corporations—Transfer of sculpture with copyright—Other transfers—Patented inventions.

AS far as I know, every nation, however little civilised, has speedily found it to be for the public good to compel its members to keep their promises one towards another—so long as they did no harm to other members of the community.

The law of contracts is more important to the man in the street than any other. Everybody, I think, makes contracts every day, or almost every day. If you take a ride in an omnibus, you make a contract. If you have your dinner at a restaurant, you again make a contract. When you buy a new suit of clothes for yourself, or a new frock for your wife, or pair of shoes for the baby, you make a contract. And although the legal transaction known as a contract is so common that we enter into it without a thought, not one person in a thousand knows of the legal requisites and attributes of that transaction.

I shall all through this book use the word "contract" as synonymous with the word "agreement," though it is not strictly correct. All contracts are agreements, but all agreements are not contracts. Thus, I agree to come and dine with you on



Monday ; but it is not a contract, because it is not an agreement which the law will enforce. In other words, if I do not fulfil my promise you will not be able to bring an action against me for damages. **A contract is an agreement which the law will enforce.**

Now let us analyse the contract and see what it consists of, and how it can be entered into. I ought to say, to begin with, that the English and the Scots law do not differ very much in this branch. What I am about to write may be taken to apply equally in Edinburgh as in London, in Glasgow as in Birmingham. When there is any difference I will point it out as clearly as I can.

The law of contract depends on this principle : men shall be compelled to act up to their promises. Why ? Because if I promise to do something for you, and fail to carry out my engagement, you may suffer heavy loss. Thus, if I, being a retail tradesman, keeping a grocer's shop, ask you, a wholesale dealer, to send me a hundredweight of tea on or before Monday, and you promise to do it, and do not send the tea, what is the result ? My stock runs dry on Monday night, and when customers come to buy, I have to tell them that I have none to sell ; and so I lose my custom and fail to make my profit.

Now there are certain things absolutely necessary for the formation of a contract. The first is, that there should be two or more persons. It goes without saying that no man can make a contract with himself. And yet (would you believe it ?) some people have been known to try. For instance, A is the trustee of a will, and has some money belonging to the trust to invest. So he lends it to himself, and agrees to pay five per cent. interest. When asked how he thinks he can make a contract of borrowing and lending with himself, he replies, "Oh, I lend as trustee. I borrow in my private capacity." In the most friendly way, I should advise any acquaintance of mine to avoid such borrowing and such lending. Judges are apt to call it the fraudulent appropriation of trust money for your own purposes, and will inevitably deal with it as such.

Having got the two or more persons, the next thing is to bring them together. They must agree, in their own minds, on the same thing. This mental agreement is called by lawyers "consent," from the Latin *con*, together, and *sensus*, sense. They must bring their **minds** together. Generally this takes some time. They meet and talk it over, or they write letters to each other—in fact, the agreement of the minds is brought about by negotiations. But, in the end, all contracts can be reduced to two things, namely, **an offer on the one side, and an acceptance of that offer on the other side.**

The more you think of it, the more you will see how true this is. And I want you to be very careful not to confuse a real acceptance of an offer with a false one. Let me explain what I mean. Mr. Blank writes you a letter :—

" February 27th, 2090,

" Commerce House, Wide St., E.C.

" DEAR SIR,—I have received a consignment of treacle from the West Indies, which I have on offer at £2 a hogshead. Will you take a hundred hogsheads ?—Yours truly,

" O. BLANK."

To this you reply :—

" February 28th, 2090,

" .2, Sale St., Slocum Pogis.

" DEAR SIR,—In reply to yours of yesterday's date, I accept your offer of a hundred hogsheads of treacle at the present market price.—Yours truly,

" B. DASH."

It is all very well for you to say "I accept your offer"; but you do not accept his offer. He says, "I will sell to you at a fixed price of £2." You say, "I will buy at market price." Strange and almost inconceivable as it may appear, there are hundreds of men who would say that unless Blank wrote declining to do business, he is bound by a contract. As a matter of fact there is no contract at all. The two parties are never in agreement, and Dash's letter simply amounts to a fresh offer of another contract. The correct way of expressing it would be to say, "I am willing to buy 100 hogsheads at market price."

This is, perhaps, an extreme case, easy to be detected. But there are others where it is not so easy to say that the parties have not come together. For instance, Dash says to Blank (or writes to him), "I want to sell my house, Pleasant Villa. You can have it for £500." And Blank replies, "Thanks. I'll buy Pleasant Villa at the price you name, subject to what my solicitor thinks about it." Here, again, there is no acceptance, because Blank wants to consult his solicitor. After the man of law has delivered his oracular opinion, Blank goes to Dash, and says, "I've seen Mr. Taip, of Taip, Parchmentz & Co., and he says it's all right. So when will you be ready to let me have the house?"

But in the meantime somebody else has offered Dash £550 for the villa, and Dash has promptly closed with the offer. His reply to his friend Blank, therefore, is that he (Blank) is too late for the fair. Blank does not like it. He says, "But I said I'd have it." "Not a bit of it," Dash replies; "you said you'd have it subject to what your lawyer thought. I was not going to wait until I heard what he thought, so I sold to Asterisk, who offered me a better price." And Mr. Dash is undoubtedly right. Blank cannot bring an action for breach of contract, because there never was a contract to be broken.

There is a plain practical conclusion to be drawn from this. It is—if you mean to accept an offer, say so. Do not try to impose any conditions whatsoever, for if you do, the result will be something you do not intend. The only way to accept an offer is to accept it exactly as it is made. And the reason is so simple as to be obvious. It is this: Your mind and the mind of the other party are not and cannot be at one unless you both agree on identically the same thing without the slightest variation.

You must, I say, agree on precisely *the same thing*, for if one is thinking of one thing and the other of another, there can be no contract, because there is no unanimity. It may seem almost impossible for people to think that they agree on the same thing and yet not do so; but it has happened more than once. The most peculiar case that I know was one connected with the cotton trade.

Two cotton-brokers met one day on the Exchange, and one of them, whom we will call A B, asked the other, whom we will call X Y, if he wanted to buy cotton. X Y said "Yes," and a bargain was struck in these terms:



"X Y agrees to buy, and A B agrees to sell, 125 bales of cotton *ex Peerless*, from Bombay." The phrase "*ex Peerless*, from Bombay," means that the cotton was on the way from Bombay in a ship called the *Peerless*.

It would hardly seem possible for any dispute to arise about the contract which was in writing and in terms so clear as these. But as luck would have it there were two ships, both called the *Peerless*, both sailing from Bombay, and both laden with cotton. The cotton carried by one *Peerless*, however, was of a far superior quality to that carried by the other. Now when X Y agreed to buy, he thought he was buying the superior cotton carried in *Peerless* No. 1, at which rate he would have had an excellent bargain. But when A B offered to sell, he was offering the inferior cotton carried by *Peerless* No. 2. Strange to say, neither of the two brokers knew that there was more than one *Peerless* on the way from Bombay.

When *Peerless* No. 2, carrying the inferior cotton, arrived, A B requested X Y to take delivery of the cargo. As might have been expected, X Y would not take it. "This is not the cotton I bought," he said. "The cotton I bought was of far finer quality." "It is the cotton *ex Peerless*, from Bombay," A B replied. And then they both made inquiries, and found out that there were two *Peerlesses*, both from Bombay, and both bearing cotton. The mistake was unfortunate for both seller and buyer, and as the latter absolutely refused to take what he never intended to purchase, and as the seller insisted that he was not going to have his goods left on his hands, they went to law about it. You can, perhaps, guess the result. After carefully weighing all the evidence, the jury found as a fact that A B was thinking of one thing, and X Y of another. Consequently, there never was any real agreement at all. So X Y was not obliged to take what he never intended to buy.

Pray do not run away with the idea that you can get out of an inconvenient contract at any time simply by saying that you did not mean what the other party meant. If the judges listened to tales of that kind, trade could not be carried on for twenty-four hours. Let me take an example to show you what I mean. You come to me and say, "I will buy your black horse Peter for £50"; and I say, "Done." Then when I offer you my black horse Peter, and demand the money, you say, "Oh, I didn't mean this one: I meant that other black horse of yours"—which turns out to be my black horse Sam.

As they say in the North, "That cock won't fight." You said Peter, the black horse, and Peter, the black horse, you are bound to take, or else pay me damages for having broken the contract. But if both the horses were black, and both called Peter, and you intended one and I intended the other, there would be no contract. The case of the two Dromios does happen occasionally, but not often. I want you to see the difference between the two *Peerlesses*, where both A B and X Y said what they meant, and the case of the two horses, where I say what I mean and you say something you don't mean. The first is a case of an unavoidable misapprehension on both sides; the second is simply a piece of carelessness on your part, by saying "Peter" when you meant "Sam." In the latter case you must be held bound by what you said; or, to put it another way, you must be supposed to have said what you meant. If people were allowed to excuse themselves from legal obligations on the ground of having said what they

did not mean, the commercial world would become the happy hunting-ground of the swindler and the rogue. "Speech," said Talleyrand, "was given to conceal our thoughts." The maxim may be all very well of diplomacy—has not an ambassador been defined as "a man that lies abroad for the good of his country"?—but it finds no favour in trade nor in the Law Courts.

There is another case in the Law Reports which shows how necessary it is for parties to agree precisely on the same thing, *and not to leave anything indefinite*. A Mr. Johnson, a commercial traveller, wrote to a calico-printer named Appleby, offering his services at a certain salary, and in reply received the following letter: "Yours of yesterday embodies the substance of our conversation and terms. If we can define some of the terms a little clearer, it might prevent mistakes, but I think we are quite agreed on all. We shall therefore expect you on Monday.—(Signed) J. APPLEBY. P.S.—I have made a list of customers, which we can consider together."

After this, Mr. Johnson considered himself engaged, and presented himself on Monday at Mr. Appleby's warehouse. But in the interval the latter gentleman had changed his mind and refused to employ Johnson. A lawsuit was the result. Johnson contended that his offer of services had been accepted, but the Court held otherwise. It was evident, they said, that the affair was only a negotiation, and not a contract. Appleby's letter was subject to the condition that a list of customers should be agreed on between himself and Johnson. In other words, the acceptance of the offer was incomplete and conditional. There were some terms still to be arranged and defined. Therefore, the parties had not yet fixed their minds on the same thing, and there was no contract.

This leads me up to another fundamental truth, which is, that **every agreement must be certain and defined**, or at least definable. By this I mean that it must be something that a judge or jury can take hold of. This is easy to talk about, and seems very simple—indeed, quite obvious. Wait, however, until you come to put it into practice, and you will see how you will forget all about it. Men, even keen business men, have such a habit of using vague and indefinite expressions, that they frequently astonish their lawyers, and cause those advisers to wonder how they (the business men) manage to carry on their business.

For instance, the gentleman who deals in horses is generally credited with some considerable amount of sagacity, not to say wariness. For my part, I think if you want to buy a horse from a dealer, it is generally the best policy to engage another dealer to act for you. If you don't, you may find yourself encumbered with a nag possessing every equine vice and without one single virtue, and at a fancy price to boot. Nevertheless, there is a case on record of a dealer who sold a horse—a steeplechaser—on these terms: "£200 down and an extra £10 if the horse is lucky for you." The horse ran in several races, and secured two or three first and several second prizes. Then the seller claimed the extra £10, which for some reason or other the buyer did not feel called upon to pay. Whether he thought his purchase not lucky enough, or whether he simply would not pay, I know not. The dealer, however, brought an action



for the £10, and clearly proved the arrangement that had been entered into. But the Court would not assist him; they declared themselves unable to give a legal meaning to the word "lucky" as applied to a horse. In other words, the meaning of the buyer and the seller was so vague, that it was impossible to tell with certainty what they did mean. And so the horse-dealer for once did not get the best of the transaction.

I daresay most of you have heard the phrase, "I leave it to you, sir." It is a phrase that rolls glibly from the tongue of the man who does casual jobs, from the tongue of the seaside boatman, and all such-like folk. You ask, "How much will you charge to row me round the man-of-war in the harbour?" and every other time the answer will come, "Oh! I'll leave that to you, sir," accompanied by a sawing motion of the right hand to and from the forelock. In fact, the said sawing motion, combined with "leaving it to you," seems to be the stock-in-trade of your 'longshoreman, your flunkey, and your loafing casual jobber. Now the result is, from a legal point of view, that you are not obliged to pay the man anything at all. "I leave that to you" means, in law, nothing. There is that same lack of definiteness that characterised the contract for £10 extra if the horse was lucky.

Let me warn you when you offer to do anything for which you expect to be paid, never to "leave it" to the other party. He may pay you, and will, if he be an honourable man. But he may not be an honourable man, or he may die before he has paid, and then you will have to deal with his executors, who will not pay a mere debt of honour.

A case in point was where Jones offered to do something for Brown on these terms: "You shall pay me £10 if Robinson does not approve of the work; but if Robinson approves, you shall pay me what you consider reasonable." The work was done, and submitted to the judgment of Robinson, who approved of it. "Now," said Jones, "pay me." But Brown, not being an honourable man, refused to pay. He said, "If Robinson is satisfied with your efforts, I am not, and I decline to give you a penny." This line of conduct was anything but satisfactory to Jones, as you may readily imagine, and he brought an action against Brown to recover the value of his work. In this he failed. The judge said, "Your contract was to take whatever Brown thought reasonable. In other words, you left it to Brown's sense of honour. The law is unable to enforce such an agreement as that, because we cannot tell what sum Brown did think reasonable. The law is unable to enforce a vague agreement of that kind."

Will my reader follow me while I draw a distinction and point out a difference? If the agreement had been: "Brown to pay a reasonable sum," that would have been enforceable, because a jury could have determined what was a reasonable sum. But there is all the difference in the world between a reasonable sum and "what Brown thinks to be a reasonable sum." Therefore, anyone is quite safe to contract to do work for "a reasonable sum," or "a fair price," because that means, in effect, such a sum as a judge or jury may think reasonable or fair. The uncertainty comes in when the contract is to "leave it to you."

Again, if Cassell and Company write to me and say, "Will you write a book of

520 pages on Chinese metaphysics?" without mentioning the price; and after I have written it and they have accepted it, they ask me how much I want for my work, and I say "I'll leave it to you," they are bound to pay me a reasonable price. Because when I do work for anyone, and nothing is said beforehand about the remuneration, it is understood in law to mean that I shall be paid what is reasonable and fair. The question must be decided, in fact, according to the market value of the work. And when I say, afterwards, "I leave it to you," I mean simply that I leave it to them to pay me a reasonable price. There is all the difference in the world between that position and the position of one who agrees beforehand to take what his employer considers reasonable.

I hope I make it clear. When you say, before you undertake the work, "I will leave the remuneration to you," it is an agreement to do the work for whatever the other man likes to give you. And that may be anything or nothing. If, on the other hand, you are requested to do the work, and nothing is said about price until after you have done it, you are entitled to the market price of your labour. And when you say, "I will leave it to you," you are inviting the other man to name a reasonable remuneration. The difference comes in between *before* and *after*.

So far we have come to this: every contract requires two or more persons who must make up their minds to the same thing. This, however, is not all. You and I may have made up our minds—you that you are willing, for instance, to sell your horse for £20, and I that I am willing to buy him at that price; but this is not enough.

The next thing to be done is that each of us shall make known to the other his intention. In plain English, **we must each communicate his intention to the other.** As an old judge once put it, "The thought of man is not triable." It is only when men express their thoughts that a court of law has anything to go upon.

How is this communication to be made? I do not wish you to run away with the idea that it is necessary for either of the contracting parties to speak or write to the other. An offer and an acceptance can be communicated or expressed by act just as well as by word. For instance, you go to a bookstall where you see a book marked two-and-sixpence. You pick up the book and throw down half-a-crown. There is a complete contract of sale. The bookseller, by exposing the book with the price marked on it, is saying "I am willing to sell this volume for half-a-crown," just as much as if he stood there calling it out aloud. And you, by picking up the book and laying down the money, say "I accept your offer," just as effectively as if you used these very words.

One of the best illustrations of this idea is seen every day in auction rooms. The auctioneer is selling a table. Someone says "Ten shillings"—the meaning of which is apparent. Then the holder of the hammer casts his sharp eye round the room, and, meeting his glance, you nod. He says, "Eleven shillings for the solid mahogany dining-table. Going, going, gone!" A tap of the hammer and the thing is yours, and you are liable to pay eleven shillings. You have not spoken a word, but your nod plainly said, "I am ready to buy the table for a shilling more than the last man offered." The knock of the hammer is the



auctioneer's way of saying, "I accept your offer on behalf of the seller of the table." I shall have a little more to say about auctions later, but so much now to show how you may enter into a valid contract, communicating your mental intention by an act, without words.

Now, though it matters not one jot how you communicate your intention to accept an offer, you must communicate it somehow. In other words, you cannot accept an offer and so make a contract by mere silence without any act at all. Various old saws there be about silence. "Silence is golden," says one sage. "Silence gives consent," says another. All of which is no doubt very wise in its way, but it certainly does not apply in the law of contract. Let me show you what I mean. Mr. F. was a farmer, who, being about to give up business, desired to sell his stock. Amongst other things he possessed a bay horse which had always been much admired by a friend, Mr. B. So when Mr. F. wanted to sell off, he thought he would give B. the first offer of the animal, and wrote to him as follows:—

"DEAR B.,—I wish to sell my bay horse. You can have him for £40. If I do not hear from you by Monday I shall consider him yours.—Yours faithfully,

"F."

Honest Mr. B. was only too glad to become the owner of the coveted quadruped, and considered it cheap at the price; so, in obedience to the letter, he did not write, nor, in fact, do anything, imagining that silence gave consent.

But on the Wednesday the rest of F.'s stock was sold by auction; and the auctioneer, by pure mistake, sold the bay horse which B. thought he had bought. Thereupon B., not liking to lose his bargain, took action against the auctioneer, because, he said, the auctioneer had sold his (B.'s) property. The case turned on the question whether or no the horse had been sold to B. If it had, the auctioneer had no earthly business to sell it again. But the Court held that there never had been a sale to B. at all, because he had done nothing to show that he accepted F.'s offer. I daresay poor B. thought himself hardly used; but I will undertake to demonstrate that the judge's decision was not only right in law but most useful to the public.

Take this case: Suppose a man who sold bicycles wrote to you, "Dear Sir,—I have a beautiful bicycle for sale, built by the X Y Z Cycle Company; spring saddle, pneumatic tyres; price only £20. If I do not hear from you by Monday I shall consider it yours." You do not want a bicycle. Either you have one already, or else you do not ride. Is it reasonable that you should be put to the trouble and expense of answering such a letter? And if you do not answer it, is it reasonable to say that the man should be able to thrust the machine upon you willy-nilly, and say, "Silence gives consent. I told you not to answer if you wanted the bicycle, and as you have not answered I am entitled to say that you accepted my offer?" It does not need the wisdom of Solon or Solomon to see how dangerous it would be to hold that people could force contracts on you in this way; and the judges in the horse case, seeing the danger, laid down the law most emphatically to be this: You may accept an offer by word, writing, or act, but you cannot accept without one of these three. Mere silence is of no effect, even when you intend that

it shall have effect. For my part, I think the public owe a debt of gratitude to the judge who decided that case. Any other decision would have let loose such a flood of letters from sellers of different commodities, every one of which we should have been compelled to reply to, that life would have become unendurable.

Many of us, when we have entered into the holy state of wedlock, have received so many circulars as to drive us nearly crazy. Circulars from house-agents, circulars from furniture-dealers, circulars from pianoforte-sellers, circulars from grocers soliciting the favour of our custom, from dressmakers who hope to have the honour of robing the other half of us. Fancy how it would be if to each of these missives were added a P.S.: "I have a nice house at No. 12, Gooseberry Lane, to let. If I do not hear from you on Monday I shall consider you have taken it for five years at £100 a year rent." Or this: "I have a drawing-room suite in rosewood and satin at the exceedingly low price of £50. If I don't hear from you on Tuesday I shall consider it yours." That would be cheerful, not to say exhilarating.

I have not yet said all that is necessary to be said about accepting the offer of a contract. I want you to bear in mind the general principles that an acceptance must be mental—that is, you must agree on exactly the same thing as is offered to you, and then by some physical act signify that mental agreement to the man who has made the offer.

Serious questions sometimes arise as to **how the acceptance is to be signified**. For instance, if you telegraph to me offering to sell me something, am I bound to reply by telegram, or will it be sufficient if I write? Or, again, if you write to me offering to strike a bargain, and wind up with "Please wire reply," am I bound, if I wish to close with the offer, to "wire" (ugly word "wire"! ), or will it be enough if I send you a letter, provided that you receive the letter as soon as you would have received the telegram? It will appear later how important this is.

There is a proper way to accept an offer so as to form a valid and binding contract. The most simple case is where an offer is made by word of mouth and you are not allowed any time to reflect on it. In such a case it is hardly possible for any dispute to arise, because you then and there either decline or accept the proposal. But when the offer is made by letter or telegram, questions very often do crop up, and so I will devote a little space to

**Contracts through the post**, including in that phrase contracts by letter and by telegram. The first rule to be noticed is that when the letter or telegram containing the offer specifies some way in which it is to be accepted, the directions given must be followed explicitly, or there will be no contract. To show you what I mean: Jones writes to you, "Will you buy 100 boxes of Seville oranges at five shillings a box? Please wire reply immediately on receipt of this." Here you have a distinct offer of a bargain, with a particular way laid down in which you can accept it. You must, if you want to clinch the bargain, telegraph immediately on receipt of letter. No other way will do. If you reply by letter, for instance, or by messenger, or by telephone, Jones is not bound to take any notice whatever. The rule is a very strict one, and may be laid down thus: If you accept an offer made to you in the way desired by the other party, there is a complete legal and binding contract.



But if you try to signify your assent in any other way, your acceptance has not the smallest value.

I want you to notice the first part of the rule just as much as the second part—namely, that a valid contract begins as soon as ever you comply with the request of the other party. Let me show you how far this rule is carried. In the old days, before Sir Rowland Hill established that great institution the penny post, A wrote to B, offering to sell 100 sacks of flour at a certain price. This note was sent by a carrier, and at the end was a P.S. like this: "Hoping to receive answer by return carrier," which meant that B was to give the answer to the carrier when he returned the same day. B accordingly wrote a note accepting the offer made by A, and gave it to the carrier to be delivered to A the next day. But the said carrier, being addicted to drink, took several drops too much during the course of the evening, with the result that he was arrested by the police and taken to the lock-up. Next day he had an interview with some justices of the peace, and left their court some ten shillings the poorer. Now this little catastrophe seems to have scattered to the winds what little wit and memory the man had, and he forgot entirely to deliver B's note to A. He carried the precious document about with him for no less than eight days, and A, not unnaturally concluding that no answer had been sent, sold his 100 sacks of flour to some other person.

B, on his side, could not understand why no flour had been delivered, and, after waiting for about a fortnight, wrote to complain of the delay. In reply he received a letter to this effect: "Dear Sir,—Not having heard from you by return carrier as I requested, I sold the flour to another buyer.—Yours truly, A." Now, the unfortunate part of the business was that B, relying on having bought this flour, had made contracts with his customers to re-sell it to them at a good profit. He tried to buy other flour to meet his engagements, and eventually procured some, but the price of the commodity had gone up in the interval, and so B lost rather heavily. Then he brought an action against A for damages for breach of contract. A denied that there was any contract at all. He said: "I offered the flour, it is true, but I wanted an answer the next day. I couldn't keep the stuff on my hands for a week waiting for B's reply, and as I didn't receive the acceptance the next day, I concluded that B had declined to do business." This seems reasonable enough in all conscience, for how was the poor man to know that his customer was willing to buy when the letter was delayed for eight days?

On the other hand, what about the customer? It was no fault of his that the carrier got drunk and forgot his business. He had done all he could do to strike the bargain, and, moreover, he had accepted A's offer in the way that A himself desired. "Reply by return carrier," A had said. And B did reply by return carrier. What more could he do?

This, you see, was one of those cases which frequently happen where there are two parties, neither of them morally to blame; and in whichever way the case was decided it would be very hard on the loser. In such circumstances the judges must not be led away by sympathy for one or other of the litigants, but must decide upon some principle which will, in the long run, be most advantageous for the

public. And so they decided in this case, that when the man who made the offer asked for it to be accepted in a special way and through a special channel, and the other party does what he is told to do, there is a complete contract. It does not matter whether the letter or message miscarries or not. There is still a binding contract. The idea is this: You, the offerer, select your own agency or medium for receiving the acceptance, and if anything goes wrong with that medium it is just that you should bear the loss. You, personally, are blameless for the mishap, but so am I, and you chose the messenger, not I.

Now let me give you another instance. A woollen merchant named Lindsell wrote to a manufacturer called Adams: "I will supply you with 800 tods of wether fleeces at a price of 35s. 6d. per tod. Receiving your answer by return of post." Mr. Adams carried on his business at Bromsgrove, in the county of Worcester, but by some mistake this letter was addressed "Adams, Bromsgrove, Leicestershire." Now the letter was posted on the 2nd of September, and ought to have been delivered on the 3rd, but, owing to the misdirection, it did not reach the hands of Mr. Adams until the 5th—that is, two days late. As soon as it came to hand, Mr. Adams wrote by return of post, accepting the offer; and this reply reached Mr. Lindsell on the 6th or 7th. But Lindsell had expected an answer on the 4th or 5th—not knowing that the letter was wrongly directed—and as he received none, he made other arrangements, and sold his wool to another purchaser before his original letter reached Adams at all.

This is a case differing slightly from the flour case, because in this instance it was the offer which went astray through the post, while in that it was the acceptance that went wrong. Still, the result was the same in either case. It was decided that when the person to whom the offer was made followed closely the mode of acceptance dictated by the offerer, his acceptance clinched the bargain. In the case of Adams against Lindsell, the offerer said, "Reply by return of post," which meant, of course, by the first post after you receive my letter. Adams did reply by return of post, and the contract was a valid one.

In the end, Adams recovered damages against Lindsell for breach of contract to a pretty considerable tune; in addition to which Lindsell had to bear all the costs of the case—a rather heavy price to pay for the carelessness of a clerk in misdirecting a letter. And now, having told you the veracious history of the misdirected missive, let me tell you how Mr. Lindsell **might have made himself secure** against the contingencies that happened. Since that case was tried the postal arrangements of the country have very much improved, and I believe not one letter in 100,000 goes astray. But still, owing to circumstances for which no one can account, occasionally a letter is behind time in delivery, and, for reasons unknown, people do sometimes direct letters wrongly. I confess to having done it myself. The consequence of either of these events happening is that a business letter may not reach your correspondent until a day later than you intended it to; and if you have asked him to answer by return of post, he will be quite right if he answers by return of post on the day he receives it. Now you, unconscious of the mistake, expected a letter the day before, and, not receiving it, have disposed of your wares in another market. If your correspondent stands on his legal rights he can make you smart for your—or the post-office's—blunder.



Now let me show you what to do. You write, say, on Monday, the 1st. Your correspondent ought to receive the letter on Tuesday, and his answer should reach you by Wednesday morning, first or second post. When you write, instead of saying that you will expect an answer "by return of post," say, "I expect an answer to arrive here not later than 10.30 a.m. on Wednesday, 3rd inst." Thus will you obviate all risks which might be caused by your mistake in affixing a wrong address, or the delay of the post-office. The precaution is a very simple one, involving neither trouble nor expense. It may, on the other hand, save you both of these undesirable afflictions.

Now, bearing in mind the fundamental rules that a contract is (1) *a mental agreement* of two or more people on precisely *the same thing*, (2) made known on each side, or, as we conveniently express it, *communicated by one party to the other*, let us approach the consideration of another aspect of contract through the post.

**When is a contract through the post binding and irrevocable?** This question is a comparatively modern one, simply because the post itself is a modern institution; and it is one of extreme importance to merchants and traders of all descriptions, seeing that half—or more than half—of British commerce is carried on by postal correspondence. The rule is that a contract is absolutely binding on both parties as soon as the acceptor signifies his intention of accepting the offer made to him. Take also this rule, that if I make an offer to you, I can withdraw it at any time before you have signified your acceptance of it, but after you have done so I cannot withdraw, because the contract is complete.

Now let me show you how important it is to know exactly when you have accepted an offer made to you by letter. Thomson writes to you, who are a cotton merchant, "I will let you have 100 bales of cotton at 7½d. per pound." This letter is on your office table when you go down to business on Tuesday morning. You think it good business, because the market price of cotton is going up. Thomson's price is very reasonable, and accordingly you decide to buy at the price named. Here you have the first part of the contract—mental agreement.

Wait a moment, though. Suppose that Thomson, after writing to you, alters his mind, the very same night, perhaps—that is, the day before his letter reaches you—and, repenting his offer, he writes to cancel it that very night. When his first letter reaches you the next morning, it is not true to say that Thomson in his mind is offering to sell you that cotton, because the second letter is on the way withdrawing the proposition. You, in the meantime, not knowing how Thomson has changed his mind, looking upon the 100 bales of cotton as practically yours, make arrangements on that footing. You may, perhaps, accept contracts at a figure lower than the ordinary market rates, because you know you have a supply of raw material cheap. Then at 12 o'clock the same morning comes Thomson's second letter: "Dear Sir,—Consider my offer to sell 100 bales of cotton cancelled.—Yours truly, P. THOMSON."

If you have made such arrangements as I have described, it is of the utmost importance for you to be able to hold Thomson to his first letter. Whether you can do so or not depends on the answer to this question—*Have you posted your*

*letter of acceptance?* If you have, you can say to Thomson, "The contract is complete, and you cannot recall your offer." But if you have not posted your letter of acceptance before the second (cancelling) letter arrives, the contract is off.

Having told you what the law is on this subject, now let me tell you why it is as it is. It is platitudinal to say that writing is only a substitute for speech, and as such the law always must consider it. So when I send you a letter posted by me at 6 p.m. on Monday, and arriving at your counting-house at 10 a.m. on Tuesday: "Dear Sir,—Will you buy 100 bales of cotton at 7½d. per lb.—Yours truly, THOMSON," it is just as though I were saying to you all the time from 6 on Monday evening till 10 on Tuesday morning, "Will you buy 100 bales, etc." As soon as you see the letter—*i.e.* as soon as you hear me saying "Will you buy, etc.," you are at liberty to say, "Yes, I will buy," and immediately you say that, you close the bargain. And if, after that, you hear me calling out, "I don't want to sell now," you will naturally say, "Oh, don't you? You kept on asking me to buy until I consented to do so, and now you don't want to sell. All I can say is, you'll have to sell, my fine fellow."

You see, in a bargain by word of mouth, as soon as the other man says "I accept," the contract is complete. He has expressed his consent. And in a contract through the post, so soon as he has expressed his consent in such a way that he cannot take it back, the contract is complete. Therefore, you have to find out the moment when he has so signified his consent that he cannot take it back. And in a contract through the post, surely that is *the moment he drops the letter into the red pillar-box*. Because the moment a letter is dropped into a letter-box it passes altogether out of the power of the sender. Her Majesty's Postmaster-General takes charge of the missive, and will not part with it to anyone except to the person to whom it is addressed. My proposition, then, that a contract is completed the moment the acceptor accepts the offer, in such a way that he cannot take his consent back, resolves itself into this, when applied to contracts through the post: *As soon as ever the acceptor posts his letter of acceptance there is a binding agreement*, which neither party can escape from—except, of course, by a friendly arrangement. I have italicised this, for I want you to italicise it in your mind.

By bearing this in your mind you will be able to give the correct answer to many questions. One is, *If an offer is made by post, within what time may it be cancelled?* I have already dealt with this point. The answer is, it may be cancelled at any time before the other man posts his letter (or hands in his telegram) of acceptance. Now, what is the moral, the practical utility of all this talk about the precise moment when the contract becomes binding? In the first place, it is this: If you have written making an offer of a contract, and afterwards repent, cancel your offer promptly. In other words, do not write—telegraph instead. A prompt telegram stands a better chance of being in time to stop the letter of acceptance being posted than a letter does.

There have been cases of the kind innumerable. One was that of Byrne against Van Tienhoven. Byrne & Co. were a New York firm of merchants, and Van Tienhoven & Co. were tin-plate manufacturers at Cardiff. Van Tienhoven & Co.



wrote to Byrne & Co. offering to sell 1,000 boxes of tinplates at 14s. 6d. a box. This letter was written and posted on October 1st, and was delivered in New York on the 11th of the same month. Byrne & Co. promptly cabled, "Accept thousand Hensols"—Hensols being the brand of the tinplates. They followed this up, in the usual way, with a letter, written on the 15th, sending a letter of credit for the price.

But on the 8th of October, three days before the letter reached New York, Van Tienhoven & Co. had written another letter: "We hasten to inform you that there having been a regular panic in the tinplate market during the last few days, which has caused prices to run up about twenty-five per cent., we are reluctantly compelled to withdraw any offer we have made to our constituents, and must therefore also consider our offer to you for 1,000 boxes 'Hensols' at 14s. 6d. to be cancelled from this date." This letter was delivered in New York on the 20th, nine days after the cablegram of acceptance had been sent. Byrne & Co. stood to the bargain; they insisted on the 1,000 boxes being sent, especially as they had already sold them at a profit of 1,850 dollars. Van Tienhoven & Co. stuck to the position that their letter of the 8th was a cancellation of the offer, because it was posted at Cardiff three days before their first letter arrived at New York. But the judge held that Byrne & Co. were in the right. When they sent their cablegram of acceptance the contract was complete, because at the time they sent it they did not know the offer had been withdrawn. And so Van Tienhoven & Co. had to pay the New York firm damages amounting to £375. If, instead of writing on the 8th, Van Tienhoven & Co. had cabled "Offer withdrawn," they would have been all right, and that is what they ought to have done.

There was another case of much the same kind a few years ago. X Y, who lived in Birkenhead—which is, as most people know, near Liverpool, on the opposite bank of the River Mersey—went over to Liverpool to answer an advertisement, "A house for sale." X Y called at the office of A B, the owner, and asked about the condition and locality of the property, the price, and all the usual particulars. When these had been discussed, X Y said, "Write down the terms on which you will sell, and I'll let you know in a day or two." This was on Monday afternoon. On Tuesday, X Y went to view the house and determined to become the purchaser, and on Wednesday, at two o'clock, posted a letter accepting the offer made by A B. But at one o'clock, A B had written to say, "I withdraw my offer," which letter was delivered to X Y at three o'clock—that is, it was posted one hour before and delivered one hour after X Y had posted his letter of acceptance.

The truth was that A B had received an offer of £50 more for his house, and had actually accepted it. But X Y did not want to give up his bargain, and announced his intention of standing on his rights, so there was A B between two stools. If he conveyed the house to X Y, the other man would be down on him. If he conveyed it to the other man, X Y would be down on him. In the end he decided to fight the man from Birkenhead, with the result that he lost his case. The case went up to the House of Lords, and that august tribunal decided that as A B had posted his acceptance before he knew of the withdrawal, there was a legal

and binding contract the moment the letter fell, at two o'clock, into the pillar-box at Birkenhead.

In all these cases the defendants (defenders) have argued that there was no contract until the letter of acceptance was received by the person to whom it was addressed. The way that argument was met and refuted was this: "If that were so, no contract could ever be completed by the post, for if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*." Common-sense and commercial convenience require that there should be such a rule as the one I have tried to explain, for it is of the highest importance to a business man to know when he can be certain that he has made a contract from which neither he nor the other party can escape. When A wrote to B, "Will you buy my black horse, Peter, for £20?" and B replied, "Yes, I will," it would be simply absurd if B had to wait for a further communication, "Dear B, I have received your letter, and assent thereto," and then if B had to write, "I have received your assent to my acceptance," and so on.

Now let us go back to our question: What is the proper way to accept an offer? The answer is, if the offer states any particular way, you must follow the directions given. Thus, "Wire reply," necessitates a telegraphic answer; "Let me hear by return of post," means that you must post your answer in time for the next post to your correspondent's address. "Bearer waits for answer," renders it essential that your answer shall be given to the bearer. It will not do for you to say, "Tell Mr. Smith I will let him know in an hour's time."

But it frequently happens that no such direction is given. What are you to do then? The answer is, send your reply in the ordinary course of business. If a man asks you to accept an offer in a particular way, well and good. Should he not specify the mode of acceptance, you are justified in concluding that he means you to answer in the way usually employed in that business. Thus stockbrokers generally expect and are entitled to an answer by telegram. Most other people will expect to be entitled to an answer posted on the day that you receive their letter—not by return of post, but by the mail despatched early in the evening.

This rule applies more especially in mercantile transactions, but it does not apply so strictly with regard to contracts not in the usual course of business. Thus, if I write or speak to you, offering to sell a house, I cannot expect so speedy an answer, because you will require to inspect the house before you decide. It is, however, a safe rule, that in ordinary transactions relating to your business *you ought to accept any offer made to you by the post of the same day*.

Some people have thought that when an offer is made by word of mouth it ought to be accepted in the same way. There was the case of the man who offered to sell a house to another, and the latter said, "I'll let you know in a day or two." The next day the owner received a better offer. The day after, the man to whom the property had been originally offered, wrote accepting; but the owner was unable to go on with the bargain. He said, "You ought to have called to see me. The offer was made at a personal interview, and could only be



accepted at a personal interview. If you had called, I should have been able to tell you I had cancelled my offer before you could have told me you accepted it." And so they went to law about it. And the Court of Chancery, and the Court of Appeal, and the House of Lords to boot, said that the acceptance by letter was all right. It was, they said, usual to carry on business through the post, and the acceptor having adopted a usual and business-like course, was right, and the owner was wrong. Wherefore the owner had to pay damages for breach of contract, and costs on the top of it.

**Cancelling or revoking an offer** has been touched on by me several times in connection with contract by correspondence, and I have shown that in such a contract an offer can be cancelled at any time before the answering letter or telegram has been despatched. All contracts, however, are not made by letter or telegram, and it is of the highest importance for the business man to know how far an offer is open to cancellation. Well, offers and acceptances thereof through the post do not differ in principle from any others. They do, of course, differ a little in detail from offers and acceptances by word of mouth, but the governing idea is the same in all cases.

*An offer can always be revoked any time before it has been accepted.* This rule is practically invariable. Many of us have had an experience something like the following: Kelkun meets O'Chose in the street one day and stops him, and they begin to talk business. O'Chose tells his friend Kelkun of a grand scheme he, O'Chose, has in his brain, whereby hundreds if not thousands, and probably millions, of pounds may be made. The only thing is, that O'Chose wants to be financed, and he announces that if Kelkun will advance a couple of hundred pounds, "just to start the thing, you know," the said Kelkun shall have half the profits of the venture. At last the man of schemes makes some impression on the man of money, and an agreement is come to in these terms: "O'Chose offers to sell to Kelkun, for the sum of £200, half O'Chose's patent for a patent smokeless chimney, the £200 to be applied in working the patent. Kelkun to have seven days to consider the offer."

That seems clear enough. If you asked five people, four of them would tell you that O'Chose could not retract his offer until after the seven days were up. But they would be entirely mistaken. Suppose the next day O'Chose meets yet another friend, Macpherson, to whom also he propounds the great idea of the smokeless chimney-pot. Macpherson, charmed with a notion which will at once give comfort to his fellow Britons and lucre to the holder of the invention, straightway offers then and there to become a sharer in the scheme. He offers to buy half the patent rights for £250, the same to be laid out in manufacturing the chimney-pot and pushing the sale thereof, for the benefit of himself and O'Chose. Gladly does O'Chose close with the offer, and, being now independent of Kelkun, drops him a line to say that he cancels the offer made to him the day before. By this time, Kelkun himself has become convinced of the value of the wonderful chimney-pot, and is, in fact, just about to sit down and write accepting the offer set forth a few lines above. He is too late.

Why is he too late? He is too late because an offer has never any binding effect until it has been accepted. It remains open for a reasonable time, or until it

is cancelled by the offerer. I think I can show you how hard it would be on O'Chose if he were compelled to keep his offer open for the whole seven days. In the first place, there is no corresponding obligation on Kelkun. Kelkun might, if he chose, refuse the offer. Suppose he did, where would O'Chose be? He would have refused the offer of his friend Macpherson for nothing—nothing at all.

You and I, I daresay, have had many an offer, or have made many a one, perhaps, "this offer to be kept open for twenty-four hours," or for a week, or some other period. I have been consulted times out of number about these contracts, or rather offers, such as the one I have described above, made by O'Chose to Kelkun. And when I have told the client that a stipulation to leave an offer open for a certain time does not prevent the offerer from cancelling his offer before that time, I have had one pertinent question put to me: "Is that clause no good, then?"

Yes, it is some good, though it has not the effect you thought it had. It has this effect, that if O'Chose does not cancel the offer, Kelkun can accept it (and so make a tight contract) any time within the seven days. But he cannot accept it after the seven days. In other words, the clause is against Kelkun, not in his favour. It means that he cannot, in any event, delay his acceptance beyond the seven days, and that is all it means. It does not in the least bind O'Chose to keep it open for that time.

I expect my last piece of information will be regarded as of the nature of an "eye-opener," to adopt the American phrase. Now, having told what is not the way to bind a man to keep his offer open for a certain time, let me tell you how you can tie him down. Suppose Kelkun had said to O'Chose, "My good fellow, if you will allow this offer to stand over for a week, I will give you ten shillings," and O'Chose had said, as he might have done, "I take it," then O'Chose could not have revoked his offer until the week was up. Put into plain English, it means that if you want time to consider an offer, and want to tie the other party down meanwhile, you must pay for the privilege. You cannot expect him to be tied down and unable to seek another customer for a week for nothing. It would not be either fair or reasonable.

I hope I have made quite clear the propositions, that

- (1) You may cancel your offer at any time before it has been accepted,
- (2) Unless you have been paid for keeping it open. But
- (3) You must give notice of the withdrawal to the other party, because, if you don't, how is he to know that you have withdrawn your offer?
- (4) If he manages to give you notice of his acceptance before your withdrawal reaches him, your withdrawal is of no use.

Remember always that an acceptance through the post is conclusive as soon as it is posted, but a cancellation through the post (or anyhow else) is no good until it is actually received.

So much for the cancellation or withdrawal of an offer; now let us talk about the withdrawal of an acceptance. I mean this kind of case: Body writes to Folk, saying, "Will you buy my gold watch for £20, cash in a week?" Folk thinks it good business. He has often coveted that gold watch of Body's. It is such a highly respectable timepiece, and at £20 is simply dirt cheap. So Folk writes to



say that he will take the chronometer at the price offered. Scarcely has the letter dropped into the pillar-box when Folk regrets it. He would like the watch well enough, but, after all, can he really afford such a luxury? Will it not straiten him very much to pay away £20 within the week? And so Folk thinks it over for a night, and the next morning he sends to Body another message: "Cancel my acceptance." In order to make no mistake, Folk sends this message along the wires, and it arrives before the letter of acceptance is delivered. All the same, the withdrawal is of no effect. Why not? Because when once an offer is accepted, the acceptance cannot be withdrawn. It has been laid down for the protection of the acceptor that an acceptance through the post is complete the moment it is put in the post. And, as boys say, "what is fair for one is fair for another." If that moment is the binding moment for the benefit of one, it must also be for the benefit of the other.

The rule is the same in all cases. **You cannot possibly withdraw an acceptance** unless the other party is obliging enough to allow you, and unless he is a very friendly sort of a person, you have no right to expect him to resign a good bargain.

*How to gain time.*—It very often happens that an offer of a bargain is made to you, and an acceptance is demanded by return post, and you are inclined to accept. At the same time you think that the next day's post may bring some information which will influence you in the matter. That is, the offer arrives on Tuesday morning, you must answer by Tuesday afternoon's post, but you really want to wait until Wednesday morning. How are you to do it? I would simply suggest this very simple plan:—Write, saying, "I accept the offer contained in yours of yesterday's date, subject to being allowed to cancel my acceptance by a telegram before ten o'clock to-morrow morning."

This will give you time to open your letters the next day and to telegraph a cancellation. At the same time, I warn you that the other party is not bound to accept this tentative acceptance. Your best plan is to telegraph on Tuesday:—"Accept your offer, subject to cancellation before 10 a.m. to-morrow. Wire reply." If your correspondent wires accepting these terms, you are all right. If not, you have simply thrown away the chance of the contract for what it may be worth.

**The Time for Accepting an Offer.**—I have stated before what is the effect when the offerer names a certain time within which his offer may be accepted. For instance, a notice like this:—"This offer is open for ten days," or "I give you ten days in which to consider the matter," means that unless the offer is accepted within ten days it must be considered as withdrawn.

But it happens, as a general rule, that no particular time is mentioned. In such a case, how long have you in which to make up your mind? The only answer possible to be given is that you have a reasonable time. To put it another way, unless you either accept or reject an offer within a reasonable time after it is made, the offer dies. This is not only common law but common sense as well. If I write to you and say I have a house for sale at the price of £600, and you take no notice of the letter for several weeks, I am justified in concluding that you do not want to buy, and therefore am at liberty to open

negotiations with someone else. It would never do if you were able, a month afterwards, to accept the offer after letting it lie in abeyance for so long. A great case on the subject is that of Mr. Montefiore, who, on receipt of a prospectus of the Ramsgate Hotel Company, wrote applying for shares in that company. His letter was sent in June, and he received no answer till November. Towards the end of that month the company wrote to say that they had allotted to him the shares he had applied for. At this time, however, for reasons best known to himself, Mr. Montefiore no longer wished to be a shareholder in the proposed undertaking. He therefore declined to have anything to do with the shares, and took up the position that if the company wished to accept his offer they ought to have done so long before. From June to November, he said, was an unreasonable time to try to keep the offer open. The judges took the same view, holding that an offer, if accepted at all, must be accepted with reasonable promptitude.

Having expounded to you this rule of reasonable celerity in accepting an offer, I fear I can go no further, because it is impossible to say how many hours, days, weeks, or months are "reasonable." It is easy to see that this must depend entirely on the circumstances of each case. You must take into consideration the kind of offer it is, the way in which it is made, the customs of trade or business. Thus, an offer made by one merchant to another to sell goods ought generally to be accepted at once, if at all, and a delay of twenty-four hours might, and a delay of forty-eight certainly would, be considered unreasonable. Now take the case of an author who sends the manuscript of a three-volume novel to a publisher, accompanied by an offer to sell the copyright. Unless the author mentions a specific time within which his offer may be accepted, it will be quite reasonable for the publisher to signify his acceptance in six weeks or two months. The reason why such a long time is allowed in this case is because the publisher will necessarily be obliged to have the manuscript read by one or more persons so that its merits may be known. And the value of the manuscript will not go up or down in the interval, as the value of merchandise would be likely to do. Besides, a great deal of merchandise is perishable, and spoils by keeping; manuscript does not spoil. Thus you see how reasonableness depends on the nature of the transaction.

Now let us see how it may depend on the way in which the offer is made. If I telegraph an offer to you, in ninety-nine cases out of a hundred you must telegraph back, and that immediately. A delay of an hour or two would be unreasonable in such a case, because the mere fact of my using the telegraph wire as my medium of communication shows that I am in a hurry, and that the matter will brook no delay. Therefore, even if you do not see the why and the wherefore of all this haste, it is your duty to be as quick as possible with your reply. The matter may not be urgent to you, but it evidently is to me.

Thirdly, we will consider for a moment the effect of the customs of trade or business upon this question of reasonableness. I have adverted on a preceding page to the invariable custom amongst stock and share brokers of communicating by telegraph. If a stockbroker who is in the habit of doing business for you telegraphs "Shall I buy 100 Brighton A?" custom requires that you shall



telegraph in reply before the Stock Exchange closes on the same day. If his telegram arrives after the closing of the Exchange, you may, at your option, telegraph or write so that he receives your acceptance before the Exchange opens the next morning. It is hardly necessary, perhaps, to explain the reasons for this. Everybody knows, I suppose, that the fluctuation of prices on the Stock Exchange renders it the only possible way of carrying on the business there.

**Making an offer by act or conduct.**—You can, as I have hinted before, make an offer not only by words but by act or conduct. Thus: you are a jobbing gardener, who have been in the habit of trimming up Johnson's garden about once a month, for the usual remuneration. One day, after the ordinary interval, you call to ask if you shall trim the garden up, but Johnson is not at home. You, thinking it will be all right, begin to do the work, and while you are at it, Johnson comes home and sees you, but makes no remark. Having finished your labour, you go to the master of the house for the pay; but he says, "My good man, I never told you to work in my garden. If you chose to do it, that was your business, not mine." You feel that the first portion of this speech, at all events, is quite true. He did not tell you to work in his garden. Have you, then, any right to demand pay for that which was not ordered? Undoubtedly you have, in the circumstances of this particular case—not simply because you did the work, but because your doing it, or some of it, in Johnson's presence was an offer on your part to trim up his garden for a reasonable remuneration; and the fact that he saw you and did not stop you amounted to an acceptance of that offer.

It must not be supposed, however, that this principle is to be extended too widely. If Johnson did not see you at work and did not know what you were doing you have no claim. Suppose, for instance, he left for the City at nine o'clock in the morning, and you started to work at ten and finished at five, and he did not return till half-past five, you have not the slightest shred of claim. You cannot possibly say that he accepted your services, because he never had the chance either to accept or reject, your work having been begun, continued, and ended entirely in his absence.

There was a case some years ago which well illustrates this matter. Ell & Co., a firm of shippers, chartered a vessel to go out to Africa. The object of the voyage was to explore a certain river and trade with the natives there, and the services of a competent captain, whom we will call Captain Buncle, were engaged to navigate and command the vessel for the remuneration of so much a month. As the voyage was to be into parts unknown, about a dozen gentlemen, anxious for adventure, volunteered to sail in the ship and bear some portion of the expense. All went well until the Dark Continent was reached, and then some of the gentlemen adventurers raised something very like a mutiny. Captain Buncle wished to take one course, they insisted on another, and at last the feeling became so unpleasant that the captain called a meeting in his cabin, and told the officers and gentlemen adventurers that as he could not secure discipline on board his ship, he would resign the command. Resign he did, and continued on board simply as a passenger, having, of course, by his resignation, put an end to the contract by which he was engaged.

But in a month or so the first mate died of a fever. Now, the first mate was the only man on board, besides Captain Buncle, who understood the art of navigation; and so the captain, at the request of all on board, undertook the command once more, and brought the good ship safe back to Liverpool, home and beauty. From the time of resuming command to the date of the arrival in port was seven weeks, and the captain sent in a claim to Messrs. Ell & Co. for seven weeks' pay. He said, "I acted as captain of your vessel for seven weeks; therefore I want pay as captain for that time." The reply of Ell & Co. was a quotation from a classical poet—"Nobody axed you, sir," she said. "True," said they, "you acted as captain for the seven weeks, but we did not engage you. We engaged you as captain for the whole voyage, but you yourself broke that contract by throwing up the command, and after that we did not re-engage you. We did not re-engage you by actual word of mouth, or by writing, and we did not engage you by conduct, because we had no idea of what had happened until the ship returned to Liverpool."

Then the captain, feeling aggrieved for that he had done seven weeks' work and could get no pay for it, brought an action at law. But he lost. The judges who tried the case emphatically denied that anyone could do work for another without that other knowing anything about it, and then demand to be paid. "But," argued the captain's lawyer, "Ell & Co. got the benefit of my client's labour." And then one judge put the whole thing in a nutshell: "If you black my boots without me knowing anything at all about it, I must put them on, and so have the benefit of your labour. But you cannot compel me to pay for the work." Therefore, if you make an offer of work by doing it without a verbal or written engagement, be sure that the other man knows you are doing it, otherwise he need not pay you unless he likes.

**Accepting an offer by act or conduct.**—As you may make an offer by an act, so, also, you may accept an offer by an act. For instance, you see on the Great Northern Railway time-table that a train will leave King's Cross for Edinburgh at 10 o'clock, arriving in Edinburgh at 6.30. You will also find at the station in the list of fares: "Edinburgh, 32s. 8d." This is an offer of a contract to carry you or anybody else to Edinburgh at that time, for that fare. When you go to the booking-office at ten minutes to ten, say the word "Edinburgh," and lay down thirty-two shillings and eightpence, you accept the offer to carry you to Edinburgh. There is then a complete contract, just as though it had been written down: "The Great Northern Railway Company agrees to carry John Jones from London to Edinburgh by a train to leave London at ten o'clock, and to arrive in Edinburgh at half-past six, in consideration of the sum of thirty-two shillings and eightpence to be paid by Jones; and the said John Jones accepts the offer."

The kind of offer which is usually accepted by an act is an offer made by advertisement. We see every day, advertisements of this kind: "Lost—a black-and-tan terrier, answering to the name of Fido. Any person returning the same to Mrs. Barker, Pleasant Cottage, will receive ten shillings reward." The way, and the only way, to accept this offer is to return the beloved Fido to his sorrowing mistress. That lady is then bound to pay the ten shillings. I say she is bound to pay, because I have heard of ladies who, after advertising a reward of ten shillings



for the return of a lost pet, have offered the finder the sum of half-a-crown. This is not only dishonest but illegal, for when the finder returns the dog, he is entitled by law to claim the promised reward.

There is one very curious feature about these advertisements offering rewards for the recovery of lost property, or for the furnishing of certain information—namely, that the person who recovers the property or furnishes the information is entitled to the reward, whether he has or has not seen the advertisement. A startling, not to say romantic, illustration of this idea occurred some years ago in Wales. A gentleman of the Principality, Carwardine by name, offered one hundred pounds reward for any information which would lead to the discovery of the murderer of one of Mr. Carwardine's relations. Many months elapsed, and the crime still remained a mystery and the criminal undiscovered. Now there was a man named Williams who had been in possession of the secret from the beginning, but he kept it to himself. Indeed it was more than whispered when the facts came out that this Williams had some share in the crime. However that may have been, the man went one day to Mr. Carwardine and told him all he knew. He did not go in the hope of reward, for he had never seen or heard of the advertisement, but he delivered the murderer up to justice simply because of a miserable spite. It was a case of thieves falling out. On the strength of Williams's information, the guilty man was arrested, tried, convicted, and executed. Up to this time the reward had not been claimed, for the very good reason that the informer had no idea it had been offered. It was, in fact, several months after the condemned man had paid the penalty of his crime, that Williams for the first time learned of the advertisement. Then he claimed the hundred pounds. Mr. Carwardine, however, absolutely refused to pay, because, he said, Williams had given him the information, not in answer to the advertisement, nor actuated by the hope of the reward, but simply and solely in order to revenge himself on the criminal.

Williams brought an action for the hundred pounds, on the ground of an offer made by Carwardine and duly accepted by the plaintiff. Counsel for the defence argued long and learnedly against the claim, and their arguments, in substance, amounted to this: "There is no contract here, because at the moment of this pretended acceptance, Williams had not the offer in his mind, and he could not possibly be said to accept an offer which he knew nothing at all about." But the judges held otherwise. They said that an offer had been made of a reward for certain information. That information had been given by the plaintiff, therefore the plaintiff was entitled to the reward. The question of motive had nothing to do with the case; and so they decided in favour of Williams.

From a legal point of view, as well as a public point of view, the most interesting of modern advertisement cases is the one known as "**The Carbolic Smoke-Ball Case.**" The defendants were a company who owned a patent cure for colds, consisting of a carbolic ball, the smoke of which was to be inhaled by the patient, and they used to issue a tasteful advertisement of a young lady in the act of inhaling the health-restoring smoke. The letterpress accompanying the picture stated that the Carbolic Smoke-Ball Company, confident in the success of its patent remedy, would pay £100 to anyone who, after using the smoke-ball according to the directions on the box, failed to be cured of the most obstinate cold. A lady

who possessed a cold of a peculiarly obstinate and aggravated character, saw the advertisement, and flew for a smoke-ball. Right carefully she carried out the directions on the box ; but to no purpose. The cold, with all the obstinacy which might have been expected of such an old-established malady, refused to budge, even for carbolic smoke. And then the lady called round and asked for the £100. But it is one thing to claim £100, and quite another thing to get it ; and so madame found. So she tried a writ by way of persuader. The case for the fair plaintiff was simple enough. She said, "You offered that if I would buy a smoke-ball, and use it in a certain way, and it did not cure my cold, you would give me £100. I bought the smoke-ball. I used it in the way prescribed. It did not cure my cold. Now I want the £100." The answer of the medicine men was this : "This was not really an offer of a contract ; but simply a puffing advertisement of our wares, never intended to be taken seriously." But a judge of the High Court did take it seriously, and then the Smoke-Ball Company had to take it seriously and pay the £100.

I am far from saying that every advertisement is the offer of a contract. When Blinks advertises £100 reward to any who will prove that Blinks's Pills are not the best in the world, you may be sure that the £100 is safe in Blinks's pocket, even though you may be able to prove to demonstration that his pills consist of nothing but soft soap, with a judicious coating of sugar on the outside. Even more reasonable advertisements than this are frequently not offers in the proper sense of the term, but only intimations to the public that the advertiser is willing to consider offers. For example :—"For Sale—a semi-detached villa, Number 10, High Terrace, Bethnal Green. Price £500. Apply, Jones & Smith, auctioneers, Pump House, N.W." This is not an offer to sell ; for if it were, a hundred people might all write accepting it, and the owner would be in a position of considerable embarrassment—feeling how happy he could be with one, were the other ninety-nine charmers away. The advertisement is simply an invitation on his part to induce the public to offer to buy his house ; and if you write, expressing your willingness to purchase at the price named, that is an offer of a contract.

The law of auctions will be more suitably dealt with under the head of "Auctioneers" (*see* Chap. III., sec. 4) ; but I ought, perhaps, to explain here the effect of an advertisement announcing an auction sale. You know the usual form of these announcements :—"Messrs. Nock, Down & Co. are directed to sell by auction at Such a Place, the Valuable Farm Stock, etc. etc." Sometimes the words "without reserve" are added. In the first place, let me say that an announcement of a proposed sale by auction is not, in itself, an offer of a contract, and does not, in itself, create any liabilities. Take this case, for example :—An auctioneer had advertised a sale to take place in Suffolk. The advertisement appeared in the London papers, and on placards posted in various parts of the town, and on the day announced many London dealers journeyed down to Suffolk with intent to buy. When they arrived, however, what was their disgust to find that the property had all been sold by private contract, so that there was to be no auction ! One of the disappointed ones, named Harris, was so angry that he brought an action against the auctioneers to recover his railway fare from



London to Suffolk ; but he did not get it. After all, you see, Harris might have bought nothing, even had the sale taken place. And in such a case it makes no difference that the sale is advertised "without reserve," because in no case is the owner of the property obliged to put it up for auction, even when he has advertised his intention to do so.

But if the property is once "put up," it makes all the difference in the world whether you have advertised the sale to be "without reserve" or not. Those words mean this :—When the property is offered by the auctioneer, the owner binds himself to sell for the highest offer made and accepted. Consequently, although the highest bid may be ridiculously below the real value of the thing, the auctioneer is bound to sell to the bidder. Such was the decision in a case that came from Birmingham. Messrs. Harrison, a firm of auctioneers, announced a sale of horses, "without reserve," and this sale was attended by (amongst others) Mr. Warlow, who bid for a horse that took his fancy the sum of £40. This price was, however, less than the auctioneer cared to take, and accordingly a "puffer" who was in the room made a higher bid, and, no one going about it, the auctioneer knocked the lot down to him. A "puffer," as many of my readers are aware, no doubt, is a sort of confederate employed by the auctioneer to send the bidding up. It is a well-known fact, based on long observation of human nature as displayed at auctions, that many a man, and especially many a woman, will bid a great deal more for a lot when someone is bidding in opposition than would otherwise be the case. The idea seems to be that if someone else seems very anxious to buy, the article must be more valuable than you at first supposed. The "puffer," then, is employed to stimulate bidding, as well as to buy in lots for which inadequate prices are offered.

In the case under consideration he was used for the latter purpose. To put it plainly, Warlow really had offered the highest *bonâ fide* bid for the horse, and the auctioneer, in not knocking down the lot to him, was not selling without reserve. When Warlow discovered what had been done, he took action against the Harrisons, and the latter had to pay damages for breach of contract. It was thus conclusively decided that the man who makes the highest *bonâ fide* accepted bid has a right to the lot if the sale is announced to be without reserve.

Not so when the sale is not without reserve, for in such a sale the auctioneer is not bound to sell to anyone, even after accepting his bid. "What do you mean by 'accepting his bid'?" I think I hear somebody inquiring. Well, those of you who have attended an auction—as who has not?—know the manner of conducting these functions. Suppose the auctioneer is selling a house. He first reads out the conditions of the sale. Then he extols the house, generally commenting on its healthy situation, its beautiful surroundings, and so on, and finally descends to its particular advantages, descanting on the goodness of the drainage, the solidity and thickness of the walls, and so on. I have heard of an auctioneer who sold a property on the strength of "a fine old hanging wood in the grounds," which the purchaser discovered to consist of an ancient gallows. After exalting, in his modest way, the wares he has to sell, the knight of the hammer asks someone to be kind enough to "put it in"—meaning, to bid for the house. Anyone may bid, of course, but the auctioneer

is not obliged to take any notice of his offer. Suppose the bidding is proceeding by £10 at a time. Someone has bid £310. You nod to the auctioneer, who looks at you and says "£320." He has accepted your bid, and if the sale be "without reserve," and no *bonâ fide* purchaser offers more, you are entitled to the house at that price. On the other hand, if not "without reserve," the auctioneer is not bound to sell to you, even though he has accepted your bid.

One other word. The contract is absolutely binding when the hammer falls. Until then you can withdraw your bid, or the auctioneer can withdraw the property, or someone else can bid higher. But if you offer £320, and the presiding genius, after the usual fashion, says, "Going, going, gone," and raps his desk with the hammer, you cannot withdraw, neither can the auctioneer, nor can anyone else, make a higher bid. The rap is conclusively binding on all, whether the sale be "without reserve" or not.

When we say that an offer and acceptance together make an agreement, it is only another way of expressing the truth that the parties must consent to the same thing. Now, the consent required by the law is a real consent, and a real consent can only be given when both parties know what they are doing, and each one is allowed to exercise his free choice of consenting or not consenting.

**A Contract is marred by Fraud, Mistake, Misrepresentation, Force, or Fear.**—Let me explain each of these in detail, and first of all I will deal with *Fraud—its effect on Contracts*. Fraud is of two kinds, to which lawyers have given the name of *Deceit* and *Undue Influence* respectively. I daresay you all know, or think you know, what deceit is; but lawyers, who have to be careful to use only one word to express one idea, use the term "deceit" to mean a deliberate lie. To make it plain, I mean a false statement of fact, told with the intention that someone should believe it, and known by the teller to be untrue. Such is deceit according to the language of law. Now, if anyone has by deceit induced you to enter into an agreement with him, that agreement is never binding on you unless you choose that it shall be so. In other words, as soon as you find out that you have been deceived into making the bargain, you can at once turn round and throw up the whole thing; or, if you find it more to your advantage to stick to the agreement, you have it in your power to insist on the contract being carried out. You see, it is only the man who has been deceived to whom the option is given. The deceiver must accept the terms imposed upon him, for he has by his own fraud forfeited his equality of rights. Besides rescinding the contract, the deceived one has the right to recover every pennyworth of damage he has sustained in consequence of the deceit practised upon him.

Suppose, for instance, a man sells to you a machine which he tells you is a patent churn which will make butter in very quick time. You pay £20 for the churn, pour into it your stock of milk, and set the machine to work. You soon discover that you have been swindled, for the butter will not rise, and your milk is spoilt. On making inquiries it soon becomes evident that the man from whom you bought the machine is a rogue, who knew perfectly well that the thing he sold to you was not a churn at all. You are entitled to return



the article, and demand from him not only the return of the price thereof, but also the value of the spoilt milk.

Take another instance, of not unfrequent occurrence. You buy a horse from a dealer, taking care before you drive the bargain to ask whether the horse is quiet in harness. The dealer says "Yes," knowing all the time that it is a vicious brute, which has already kicked one trap to pieces, and has bitten the shoulder of its groom. Relying on the statement made to you, you buy the horse, but the first time you try to drive him he smashes the vehicle and throws you out. You have the right to return the animal, demand back what you paid for him, and also claim damages for the injury done both to yourself and to your trap. But to make good your right to these damages, you will have to prove not only that the horse was vicious, but that the dealer knew him to be vicious.

*Undue Influence* is another thing which will make a contract null and void. This kind of fraud is a very peculiar thing, and not very easy to trace. We know that there are certain positions in life which may give one person considerable influence over the mind of another—as, for instance, a priest, who has, in the natural course of things, great influence over the mind and over the conduct of a devout member of his flock. A solicitor, again, who does your business, has a great deal of influence over you. You trust him with your private affairs, and lean on him, and expect him to advise you; and you get into the habit of following his advice. Your trustee, again, is a person who will have great influence with you; and if you are a minor, your guardian or curator.

The law is this: that if a person in a position of confidence, on whom you have a natural tendency to rely, induces you to enter into a contract very much to his advantage, you can afterwards upset that contract, unless he proves that you were not influenced by him. There was once a case of an old lady who had plenty of money and not too much discretion. She trusted implicitly in a certain minister; in fact, she took his word both for law and for gospel, let who would contradict him. Finally she appointed him manager and director not only of her spiritual, but also of her temporal affairs. He obtained complete influence over her mind, so that she was as clay in his hands, and then he used that influence to feather his nest. In course of time the old lady died, and the Court of Chancery was called upon to investigate her affairs. The result of this investigation was that the minister was compelled to disgorge every penny. He had not stolen it, you understand, but he had persuaded the old dame to give him some of it and sell the rest at absurdly low prices. The Court laid it down that whenever one person is shown to have acquired great influence, amounting to complete control, over another, such influence must not be unduly exercised for the benefit of the strong-minded person.

The fact is, that the weaker-minded of the two becomes in time absolutely incapable of resisting the demands of the stronger-minded. Any dealing between them, therefore, is no longer voluntary; for the will of the one is completely under the dominion of the other. You might as well say that a person hypnotised is capable of making a contract with the hypnotist, as to say that a weak-minded person, long under the control of a strong-minded one, is capable of making a

contract with him. If you are ever unfortunate enough to come under such influence, and are induced to make ruinous and foolish bargains, remember that as soon as you get out of the influence, you ought to take prompt steps to set those bargains aside. If you are not quick about it, you will lose your chance. There was a celebrated case, some years ago, illustrating this point. A devout woman entered a Protestant nunnery. Besides being devout, she was rich, and was induced, she said, by the Lady Superior, to give a great part of her fortune to the institution. The Lady Superior's power may be judged by the fact that one of the rules of the nunnery was unquestioning obedience to that lady. After having been a nun for some years, the devout lady had had enough of it, and returned to the world. Now, although she stated that she had only given her property to the nunnery under pressure, she took no steps whatever to get it restored to her until after she had been out for five years. This was held to be a fatal bar to her claim when she did make it. *Promptitude* in seeking your remedy is one of the essentials of success in a lawsuit. Delay is fatal.

Every agreement, in order that it may be a binding contract, must be free from *Mistake*. I do not mean mistake in writing it down—as, for instance, if you wrote, "I am willing to buy a thousand tons of soap," when you really meant a thousand tons of coke—a mistake which actually did happen once, through a mistake on the part of a shorthand clerk. That is not the kind of mistake I mean when I say that a mistake renders a contract null and void. The kind of mistake I mean is where the parties express themselves correctly, but their minds are not at one. You remember that case about the cotton to arrive *ex Peerless* from Bombay. That is the sort of case I mean. Now that was a case where the mistake related to the thing contracted about. But it is quite possible to have a fatal mistake, not with reference to the thing contracted about, but the person contracted with. Smith, of Dublin, the draper, has dealt for years with the well-known house, Brown, Jones & Robinson, in the City of London. On January 1st, 1896, old Brown retires from the firm, and young Brown is admitted into partnership. No notice of the change of partners has been sent to Smith, of Dublin, when, on January 2nd, he sends an order for two pieces of silk, one bale of flannel, and four bales of flannelette. The new firm (because whenever a new partner is admitted or an old one retires, it is a new firm) execute the order. Smith is entitled to repudiate the whole transaction. I do not mean that he can take the goods and refuse to pay for them, but he can refuse to take them at all. This may sound a little startling to some people, but it is a fact. And now for the reason. When Smith sent his order, he sent it to old Brown, Jones & Robinson: it was accepted by young Brown, Jones & Robinson. Smith thought he was making an offer to the old firm: the new firm thought he was making an offer to them. There is clearly a mistake as to the identity of the persons with whom the contract was intended to be made; therefore there was no contract at all. Of course, if Smith takes the goods and uses them so that he cannot return them in the same condition in which they were sent, he must pay for them.

*Misrepresentation* is another thing which prevents true consent being given, and so prevents a real, binding contract from being made. Misrepresentation is very like deceit, except that the latter is a false statement, known to be false—in



other words, a deliberate lie—while misrepresentation is a false statement not known to be false when it is made. A certain solicitor, Mr. Redtape, lived in a little country town, and there carried on business. He had bought the house in which he resided, and wishing to give up business, he offered to sell both his practice and his house to another limb of the law, Mr. Wafer. He stated that the practice was yielding an income of £500 a year, and offered to allow Mr. Wafer to go through the books and see for himself. "I won't trouble to do that," Mr. Wafer replied; "I am quite willing to take your word for it." The bargain was struck and the purchaser entered into possession. But soon he found that the practice was not worth half of £500 a year, and accordingly he repudiated the whole agreement. Lawyers do not often go to law, except for their clients; but these two found themselves in court on their own account. The judge decided in favour of Mr. Wafer. It is true, his lordship remarked, that Mr. Redtape offered to show his books of account; but he had stated that the practice was worth £500 a-year, and the other man was quite entitled to take him at his word. In this case it was not suggested that a deliberate falsehood had been told. Probably Mr. Redtape really thought his practice to be worth the figure he said it was; but as far as the purchaser was concerned, the result was equally disastrous. He had been misled; for while he thought, and was induced to think, that he was buying a lucrative practice, in fact he was buying a poor one.

As far as my experience goes, there is more misrepresentation in connection with the sale of businesses than in any other kind of contract—except, perhaps, the sale of horseflesh. Sometimes this misrepresentation develops into downright fraud; and there are, as is well known to lawyers, a whole class of unscrupulous rogues who make a living by selling businesses as going concerns. The way the game is played is something like this: The rogue hires a small shop, and sets up, say, a grocery business. He buys for the first month a comparatively small quantity of stock. The next month he buys more, and still more the following month, taking care to pay for all he receives and to get receipted bills. To the uninitiated it would seem that the new shop was thriving, because the consumption of tea and coffee, currants and raisins, is steadily increasing month by month. But it does not follow that because more has been bought that more has been sold. As a matter of fact, this grocer has a confederate who really does keep a grocer's shop, and the greater part of the stock taken into the new shop has never been sold there, but has been handed over to the confederate at wholesale prices. At the end of about six months you will see an advertisement, like this, in the papers: "Sound grocery business to be sold. Profits, £5 per week. Good locality. Good reasons for leaving. Apply, A. B., etc."

Now there are always a number of people to be found whose ambition it is to take a shop. They may know little or nothing of shopkeeping—that does not matter. Working men who have saved a little money, or have perhaps had a little left by some relative; the housemaid and footman who marry on their savings, not being able to remain in service after entering the connubial state, are desirous of investing those savings in the most profitable manner—these, and dozens of others, are always on the look-out for small businesses to be had on reasonable terms. One of them applies to A. B., who invites him to an interview,

shows him the shop, fairly well stocked, and descants on the enormous profits of the grocery business in general and this grocery business in particular. He shows his bills, receipted, from the wholesale houses, and assures his dupe that there is a clear average profit of fourpence in the shilling on everything sold. If the dupe does not care to take his word, he may inquire in the trade. A. B. does not, as you may well suppose, tell the intending purchaser what has really become of the goods enumerated in the invoices; and in time an arrangement is made whereby all the stock in the shop is to be taken over at cost price, and the sum of, say, £50 to £100 is paid for the goodwill of this beautiful business. The sequel I need not relate, further than to say that an action for fraud is brought against A. B. if he can be found, which is seldom. I would say, that in these cases there is always great difficulty in proving the fraud; but if you should become the dupe of one of the business-manufacturing class, you can always recover your money on proof of the falsity of the statements made to you—if you can find your man. I hope that what I have written may be a warning to my readers not to be too ready to buy a going concern. Make inquiries in the neighbourhood and see how long it has been started, and be suspicious unless you learn that the business has been carried on for a year or two at the least.

You remember the case I put to illustrate the law of Deceit—I refer to the time when you buy a horse warranted quiet to drive, and it turns out to be a vicious beast, which kicks your cart to pieces and throws you into the road. I said that if the horse-dealer, when he warranted his horse quiet and good-tempered, knew that it was full of vice, you could not only get back your money and return the horse, but also sue for any damage it had done. Now, suppose that the dealer did not know—that he made the assertion in good faith. What can you do then? Well, you can return the horse and demand your money back; but you cannot claim anything for the damage done. That is the difference between the remedy for Misrepresentation and the remedy for Deceit.

**Force or fear** is called "duress" by lawyers, and just as a person who is deceived into making a contract by fraud or misrepresentation does not really consent at all, so the person who is forced or frightened into an agreement cannot be said to consent. When bold Dick Turpin stops you on the road, it does not make much difference whether he politely asks you if you are willing to make him a present of your cash and jewellery, or calls out in melodramatic style, "Stand! your money or your life." In either case you will probably hand over your money and valuables with haste, if not with joy; nor will it avail the highwayman much, when the myrmidons of the law eventually seize him, to plead that he did not take anything—all was given to him. The same thing happens even in our time, but in these unromantic days there is no longer the picturesque highwayman who faces you boldly, pistol in hand. To him has succeeded the blackmailer, whose game is to extort money by threatening not your person, but your reputation. I need hardly say that any agreement made with one of these scoundrels is not in the least degree binding, and the blackmailer can, as a rule, be effectually scotched by calling in a policeman. This further hint let me give: if anyone endeavours to extract money from you by threatening to reveal a crime you have committed,



you need have no fear of giving him up to justice, even if you have committed the crime. For it is equally criminal to attempt to extort money from a guilty as from an innocent person, and the prisoner will not be allowed to call evidence to show that you really were guilty of the crime which he threatened to publish.

It used to be a common thing in days when the arm of the law was not so far-reaching as it is to-day, and certain people were able to defy with impunity all efforts to bring them to justice, for people to be imprisoned, or threatened with personal violence, unless they consented to sign a bond or enter into some other contract for the benefit of the oppressor. Jews especially were reckoned fair game for this kind of sport all through the knightly, chivarious Middle Ages. Even in modern times it is not altogether an unknown occurrence for a man to be intimidated by threats of violence or detention into executing a contract—it may be a bill, or a cheque, or a mortgage. Now, it is the law of every civilised nation that when a man is forced into a contract by threats or by actual force, that contract does not bind him at all—or, to put it another way, there is no contract. I have heard of such a thing as this happening:—A young woman who had just attained twenty-one, and was, therefore, out of all guardianship, lived with her former guardian. The latter was a strong-minded, self-willed man, conscientious enough, but stern and dour to a degree. Although the ex-ward was nominally her own mistress, she had lived in her guardian's family for so long, and had been treated just the same as the daughters, that she began to look on her protector as her father. And so this gentleman continued to manage the young lady's affairs, although he had no legal right to do so. The usual course was for him to make all contracts, and bring them to her for her signature and approval. Not that she ever dared disapprove, for she signed everything she was told to sign, and asked no questions. One day, however, she objected to some proposal that was put before her in the usual way, and her guardian, without attempting to explain the bargain, gruffly told her to sign. What did she know about business, he would like to know? This course of conduct made the lady quite determined not to sign, which so enraged the guardian that he seized her by the shoulders, pushed her into another room, and locked the door on the outside, telling her that she might come out when she talked like a rational being. Such a course was high-handed, it is true, but is not more than a hot-tempered father would do with one of his daughters. In the end, the lady promised to sign, and was let out when she did sign. Soon afterwards she left her guardian's house, and began an action to upset the contract she had signed in the circumstances described above. Strange to say, the agreement was one very advantageous to the lady, and she would never have attempted to set it aside had she been a woman of any business capacity. But she was so enraged at the indignity put upon her that she insisted on having her own way about it and was successful in overturning the whole arrangement, which had cost her peppery old guardian a great deal of anxious thought. The principle is—if you are forced to consent, you do not consent at all.

Let me draw the line. It must be *physical force* to which you yield in

order to enable you to claim release from the bargain, or it must be some *threat of physical force* which you have every reason to believe will and can be put into execution. Suppose, for instance, that a little man, five feet four, and weighing nine stone, comes to me, who am five feet ten, and weigh over eleven stone, and threatens to knock me down unless I sign a certain paper: if I choose to be frightened, the more fool I, because it is evident that he probably cannot do what he threatens. But if the little man pulls out a revolver, I may well be excused for complying with his requests, because the *force majeure* is with him. It is a comparatively rare thing nowadays to hear of a contract being extorted by force or threats. When it does happen, the victim is generally some old man or woman who is victimised by an unscrupulous servant.

Thus we see that every contract is formed by two or more people agreeing upon the same thing, without any reservation expressed by any of them; that this agreement must be made plain by a definite offer and an equally definite acceptance; that the offer can be withdrawn any time before it is accepted, but not afterwards; that an acceptance, once given, can never be recalled. Finally, we have noted the various ways of making and accepting offers—particularly through the post, and by acts and conduct.

Now, I want to elucidate a still further proposition, which is this—**Every contract must contemplate legal consequences.** In other words, you may have an offer, or even an agreement; but it will not be a legal contract unless it was intended to be such. A simple case will illustrate my meaning. You ask your friend Smith to dine with you on Tuesday—that is an offer. He says he will be pleased to come—that is an acceptance. An offer which is accepted makes an agreement; but in this case it does not make a contract, because you never imagined that Jones was to be legally bound to come; Jones never imagined that he was to be legally bound to come; you never thought for a moment but that you or Jones could cancel the engagement if it suited you to do so. Therefore one of the most important elements of contract, that of legality, was entirely absent.

I have often felt sorry for a man of the name of Weekes, who was egregiously deceived by an old gentleman called Tibold. Tibold had a daughter of full marriageable age, but no lovers came to woo. Weekes was an eligible bachelor, living in the same village, and upon him Tibold had cast an eye, and had often thought what a desirable young man he would be for a son-in-law. But Weekes never appears to have considered the old gentleman's daughter with a matrimonial eye, until one day, as a number of the village worthies meeting in a tavern were discussing pots of ale and matters of local interest, some one happened to ask old Tibold when his daughter was going to be married; to which question the old gentleman replied by stating that no eligible suitor had yet offered himself. Then, having in view the fact that Weekes and one or two other bachelors were present, he added, "It's not anyone to whom I would give my Polly, but the man who marries her with my consent will get £100 with her." The artful Tibold was no unskilful fisher. The bait took. Weekes, who had a keen eye for the main chance, hastened to pay his court to the fair Miss Tibold, and so successfully, that he was soon in the position of an accepted lover. Papa



was approached in due form, and, as you may imagine, his consent was freely, not to say cheerfully, given; and in due time Miss Tibold became Mrs. Weekes. It then occurred to the thrifty young husband to ask about the £100, so one day he said to his father-in-law, "By the way, when will it be convenient for you to hand over that hundred pounds?" "Hundred pounds!" was the reply; "what hundred pounds?" "Why, the hundred pounds you promised to give me if I married Polly with your consent." But Tibold flatly denied that he ever promised anything, and in the end the son-in-law issued a writ for the amount. When the Court had heard the facts, they arrived at the conclusion that there was no contract.

To many it will seem strange that Weekes did not succeed in his action, because there was a clear offer by Tibold, and a clear acceptance of it by the plaintiff. True, the offer was made to the world at large, and not to Weekes in particular; but that made no difference to the validity of the contract, because every offer by advertisement is made to the world at large, though, as a rule, it can only be accepted by one person. But the reason there was no contract to give the hundred pounds to Weekes was because of the absence of legality about the transaction. "It would be unreasonable," the judges held, "that a man should be bound by general words spoken to attract suitors." Indeed, they regarded the bait thrown out by Tibold as of just about the same value as the advertisement of the enterprising quack who offers to bestow a thousand pounds on him who will prove that Blinks's Pills are not the best in the world. It was merely a puff, never intended to create a legal bond, and reasonable beings would have so interpreted it. Wherefore, Weekes did not gain quite so much by his marriage as he had thought to do. It is sincerely to be hoped that Mrs. Weekes was possessed of the angelic temper usual to the sex—if not, I fear her better-half would not lead a very happy life. It was enough to turn any woman sour to find that she had been wooed and won, not for herself alone, but for her tocher.

I hope I have now explained what is meant by saying that an agreement is not a contract—that is, is not legally binding—unless the parties had in view legal relations.

As I indicated on page 246, there is one main point of difference between the English and the Scots law of Contracts. That point is this: the English law requires that every contract shall either be made by Deed, *i.e.* a writing sealed by the parties, or else that it shall be made for **valuable consideration**. The Scots law, on the other hand, pays no regard to consideration. All that the Scots law requires is—

(1) That there shall be a definite agreement between the parties.

(2) That this agreement shall be real, and not merely nominal—*i.e.* that it shall not have been brought about by mistake, fraud, misrepresentation, force, duress or undue influence.

(3) That the persons contracting shall contemplate legal relations.

So far, both systems of law agree. But the English system goes on to require either a deed or valuable consideration. I wish to devote some time thoroughly to explain what is meant by valuable consideration, and in what way it is essential to English contracts.

Valuable consideration may be roughly defined as a *quid pro quo*. It is the something which a man gets in exchange for his promise ; for, by English law, a bargain must be two-sided. Put in other words, this means that the Courts will not compel anyone to perform a mere gratuitous promise, but they will oblige a person to carry out a promise if he has got something, or is to get something for it.

Let me take an instance. Mrs. Sairey Gamp says to Betsy Prig, "I will give you my umbrella," but when Mrs. Prig calls round the next day to take away the promised gift, she finds that her dear friend Sairey has changed her mind, and will not part with the cherished umbrella. Should Mrs. Prig be so unwise as to bring an action for breach of contract, she will inevitably lose. Mrs. Gamp may cheerfully admit making the promise, and that she intended to carry it out when she made it, but this will not be enough to give Mrs. Prig the verdict. The judge will inquire, "How much were you to pay for the umbrella?" and the answer will be, "Nothing, sir. She didn't agree to sell it to me, but to make me a present of it." Upon which there will be a verdict for the defendant, because the promise was made without any valuable consideration. You see, the point is this: Mrs. Gamp was not to receive anything in exchange for her umbrella—neither money, nor goods, nor services. Let me make the principle quite clear: When you promise to do something, or give something, or not to do something, in exchange for nothing, you are not legally bound to keep your promise—subject to the exception of contracts under seal (*see* page 286).

Now, valuable consideration need not be in actual money, nor in goods, nor in services. It may consist merely of a promise to pay money, or give goods, or render services ; or it may consist in a promise to refrain from doing something. Take this case, for instance: A held a bill of exchange upon which B senior was liable for a sum of money. But B senior was not in a very flourishing financial condition at the time, and was unable to meet the bill. He told his son the facts, and the son went round to A, and said, "If you promise to give my father another month to pay, I will give you £10." A agreed, and did not press B senior for a month ; and at the end of that time he called on B junior for the £10. But the latter refused to pay, and when sued for it, claimed that his promise was made without valuable consideration. His plea, however, failed, because it was held that A's promise to hold his hand for a month was valuable consideration. A had, at the request of B junior, refrained from exercising a legal right—the right, that is, of at once suing B senior.

So that valuable consideration may consist in some benefit, or some promise of benefit, to one party, or some loss, or forbearance to the other. Such as this, for instance:—A agrees to give £50 to B, if B will hand over a horse in exchange. This is merely a contract of sale. The consideration for A's promise to give £50 is B's promise to deliver the horse ; and the consideration for B's promise to deliver the horse is A's promise to pay the money. Here the consideration for A's promise is some benefit to accrue to himself, and the like with regard to B's promise.

Now suppose A says, "I will give you £100 if you will promise not to build on your land, which is next to mine." B agrees. The consideration for B's promise is the benefit of receiving £100 ; and the consideration for A's promise is the detriment to B consequent on his undertaking not to build.



I do not want you to suppose that the statement, "there must be valuable consideration," means that the promiser must get full value for his promise. It does not mean anything of the kind. So long as there is something which is of some value, that is enough. Take this case, which, though it happened many years ago, is still good law. Whitacre was a farmer, and to him quoth Thornborrow one day, "Whitacre, if I pay you a five-pound note down, will you give me two rye corns on Monday next, four on Monday week, eight on Monday fortnight, sixteen on Monday three weeks, and so on, doubling it every Monday for a year?" Whitacre seems not to have been a very good mathematician, however able an agriculturist, for he readily accepted the offer, and pocketed Thornborrow's five pounds. Monday came, and the first two grains of rye were duly delivered to the purchaser, and so was the next week's quantity—four grains—and, indeed, Whitacre found no difficulty in keeping his side of the bargain until some twenty or thirty weeks had elapsed; and then it occurred to him what a fool he had been. Just work it out, and you will find that on the twentieth Monday there would be due 1,042,176 grains, and on the twenty-sixth Monday 81,899,264, and that with the year only half through! Any curious reader who chooses to work out the calculation may see for himself what a task Farmer Whitacre had set himself; and that worthy found it out for himself before long. When he did discover it, he refused to go on with the matter, because, as he said, and as was apparent, there was not enough rye in the whole country to enable him to carry out his contract.

Then the wily Thornborrow brought an action for damages for breach of contract. I have no doubt the judge and jury laughed consumedly when they heard the tale, and everybody thought what a fool Whitacre must have been. Now the farmer's lawyer could not get away from the fact that his client had made the bargain I have stated, and had received some valuable consideration from Thornborrow, but he set up a point of law, which was, that although some consideration had passed, that consideration was entirely inadequate. It was absurd, he said, that Whitacre should be bound to supply such a fabulous quantity of rye for a paltry five pounds. But the Court, though, no doubt, with great reluctance, decided against Whitacre. I say with great reluctance, because it was undoubtedly a cruel bargain. At the same time, the Court could not decide otherwise except at the risk of destroying the law of contract altogether.

The principle at stake was this: if A makes a bargain with B in such a way that A has very much the worst of it, can he come and ask a court of law to help him out of the consequences of his foolishness or rashness, just because he has been foolish or rash? To put it another way—was the Court to be asked to revise people's bargains for them? One can easily see the disastrous consequences of an answer in the affirmative. Try to imagine what business would be like if, after you had made a bargain with a customer, he refused to pay you the agreed price simply because he thought he had agreed to pay too much, and had a right to ask a judge and jury to revise the contract and fix a fresh price.

It was on the ground of the inconvenience of such a course that the judges in Whitacre's case decided that the Court will not inquire into the adequacy of

consideration—so long as there is *quid pro quo*, a something for something, the parties must be trusted to look after their own interests in agreeing that the price shall be equivalent to the thing given.

So on that ground it was held that a man who promised to return a certain boiler in safe condition, in consideration of being allowed to cart it to his place and take it to pieces, was bound by his promise. The valuable consideration there was the being allowed to have what he wanted, which was a benefit to him, and also the fact that the owner of the boiler parted with the possession of his property for a short time, which was a detriment to him.

**Consideration, to be valuable, must be substantial.**—This may be thought a self-evident proposition, such as no one would dispute, for how can anything without substance be valuable? I think, however, you will agree with me that it is necessary to lay down the proposition when I tell you that business men frequently make contracts without valuable—that is, substantial—consideration, and one kind of promise or agreement is met with so frequently as to cause great surprise. The kind of agreement to which I allude is this: Jay owes Exe £50, the sum being now due and payable (*i.e.* not payable on a future day). When Exe applies for the money, Jay finds himself unable to pay the amount, and puts off his creditor with the familiar “Call next week.” Exe calls next week, and the next, and the next, but to no purpose, and at last, tired of wasting his time in this way, he offers to take £30, if it is paid down in cash. Jay joyfully accepts the offer, produces the £30, takes a receipt “in settlement,” and as he places that document on the file, cheers himself with the reflection that Exe’s little account is wiped off. Vain imagination! As a matter of law, Exe can call the very next day and demand the other £20, because it is a principle of law that a smaller sum of money is no satisfaction of a larger sum.

Clearly, if Exe had not agreed to take £30 in settlement, it would not have sufficed to discharge the debt of £50; so the question is, does that agreement alter the case? The answer is “No,” and the reason behind the answer is that when a man does what he is already legally bound to do, that is not a valuable consideration for a promise. Why not? Because he is not giving you anything in exchange for your promise. Jay was legally bound to pay the sum of £50. When, therefore, Exe promised to let £20 go, what did he get for the promise? You may say, “He got £30 in cash down,” but I reply that he was already legally entitled to that £30 in cash down, because when you owe money you are legally compellable to pay in cash as soon as the debt becomes payable at all. Therefore, the consideration given by Jay was altogether illusory and unsubstantial. It had no value in law, because it was not a risk undertaken, nor a detriment suffered by Jay; on the contrary, he thought to gain £20: it was not a gain or prospect of gain or benefit to Exe, because he stood to lose £20; and if you look at page 277 you will find me saying that valuable consideration must be either a risk or actual detriment to the person to whom the promise is given, or else a benefit or prospect of benefit to the person who makes the promise. And yet you often find people, even business men who happen to know that contracts made in England require consideration,



agreeing to take a smaller sum in settlement of a larger under the impression that it is perfectly valid. Let me also add that even if Exe had given a receipt for £50, he could still have claimed the extra £20. (See Book III., Chap VI., under heading Receipts.)

The above is a case of a man *doing* what he was bound to do—that is, paying as much of a debt as he could. How much less, then, does it amount to valuable consideration for a man merely to *promise* to do what he is legally bound to do? This proposition seems obvious enough, but the virtue of it lies, as Jack Bunsby used to say, in the application thereof. The following is an example, not infrequent in business life, of the application of this principle:—Tom and Dick have made a contract, whereby Tom agrees to execute certain work for Dick—for instance, to build a wall round Dick's garden, to be finished by the 1st of May, at the price of £20. When the last week of April arrives, Dick finds the wall is not nearly completed, and that it will, in all human probability, not be finished for a fortnight. Wherefore he goes to Tom and says, "If you will try to finish that wall by the 1st of May I will give you an extra £5." Tom promises to do his best, and carries out his undertaking so effectually that, by dint of putting on extra hands and working overtime, the wall is completed on the 1st of May. If Dick is an honourable man he will pay the extra £5, but he is not legally bound to do so, for the simple reason that his promise to pay that sum was made without any consideration. You see, Tom was already bound by contract to finish the job by the 1st of May and, therefore, the later promise by Dick to give £5 extra if the work was done by the 1st of May was merely promising to give Tom money for promising to do what he was already bound to do. In fact, it is an agreement made for an unreal, unsubstantial consideration.

*A distinction and a difference.*—Pray do not imagine for a moment that it is impossible to satisfy a debt except by payment of the full amount due, or claimed to be due. There are three cases in which it is possible to discharge a debt without paying all that the creditor demands. I will take these in order.

(a) **By an agreement to give and take something different, though of less value,** the contract may be discharged. Thus, if Grump owes Pump £50 and Pump offers to take £30 in settlement, the payment of £30 will not, as I have shown, discharge the whole debt; but if Pump offers to take, say, £5 and an old hat, and Grump hands over a five-pound note and the ancient headgear, the whole debt is settled. This may look absurd in practice, but it is sound and logical in principle. You see, Pump chose to set a value of £45 on the old hat, which Grump was not obliged to accede to unless he chose. As I have shown by the example of Whitacre's case (p. 278), a court of law will not inquire into the adequacy or comparative value of the consideration; it will only see that something of some value was given—and Grump's hat is assuredly of some value. Possibly it might be worth £45—either because of its antiquity or of its associations. What collector of relics, for instance, would not give a large price for an old hat that had covered the venerable head of Mr. Gladstone, or for a waistcoat that had adorned the person of the younger Disraeli? At any

rate, Punp has chosen to agree to give £45 for Grump's old hat, and he must abide by his bargain.

Another way, as the cookery books have it, is for the creditor to say, "I will take a *cheque* for £30 in settlement." If the debtor gives the cheque for the smaller amount, that is enough, because he was not obliged to give a cheque—his strict legal obligation was to pay in coin of the realm. Understand, please, that it is not the payment of £30 by cheque which satisfies the debt of £50, but the special request, acceded to by the debtor, to give a cheque. So you see that an agreement to take £49 19s. 11d. is not a good agreement to discharge a debt of £50; but an agreement to take a penny and an old hat intrinsically worth twopence, is a good discharge.

(b) **Compromise of a Dispute.**—It is a frequent occurrence in business life for a creditor to agree to receive from his debtor a sum less than that really due, as a way of settling a dispute. You all know how it happens. Alpha has three plots of land for sale, and he goes to Beta, who is a land agent, and asks the latter to look out for a purchaser, promising that if Beta can get £2,000 per plot he shall be paid a commission of £100. The agent does find purchasers for the plots at the figure named, and then claims a commission of £100 on each plot. Alpha contends that he only promised £100 in all, and so a dispute arises, each party believing himself to be in the right. At last, to save the trouble and expense of a lawsuit, Alpha offers to pay £150 down to settle the matter, and Beta accepts it. Now, it is quite possible that the agent was right and Alpha was wrong, and that the proper commission really was, under the strict interpretation of the contract, £300, not £100; so that the creditor has in point of fact agreed to accept payment of a smaller sum in settlement of a larger. But this case differs from that of Jay and Exe, given on page 279, because whereas in that case there was no question as to the amount due, but only as to the debtor's ability or willingness to pay, in the instance we are now considering there is a dispute as to the sum for which the debtor is legally liable. It is this circumstance which makes the acceptance by Beta of the smaller sum a valid and proper discharge of the whole debt.

There are two ways of making a compromise such as I have described. One is when the debtor agrees to accept a promise to pay the sum agreed upon as a settlement of the dispute. The other is when the creditor agrees to accept a cash payment down in discharge of his rights. I hope I make the distinction plain. There is all the difference in the world in practice. If the creditor has agreed to accept a promise of £150 in substitution for a disputed promise to pay £300, and the debtor does not pay the amount agreed upon, the creditor can only bring an action for the £150, because the old agreement has been cancelled in favour of the new one. This is called a case of **substituted contract**. If, on the other hand, the creditor said, "I will take £150, cash down, in settlement," and that amount is not immediately paid, the creditor has a right to hark back to the first contract. That is, he will bring his action, not for the sum he agreed to take in settlement, but for the amount he believed to be originally due. In other words, the dispute revives: the creditor is at liberty to contend that £300 was due to him, and the debtor may try to prove that he



only owed £100. I may say that the creditor would most likely succeed, because the jury would require very strong evidence in support of the case of the defendant who had first agreed to a compromise, and then broken his agreement.

Another point worthy of notice is this: When you have a dispute as to the amount of a debt, and you agree to pay a certain sum in settlement, the presumption is that the intention of the creditor was to accept that sum if paid down. It is, as you see, improbable that anyone should give up a *bonâ fide* claim for £300 in exchange for a mere claim to £150. He might be supposed to give it up for an immediate payment of the smaller sum without the trouble and expense of going to law, and therefore the debtor will always have the burden of showing that the terms were not cash down. And this again, let me say, is not easy to prove.

(c) **Composition with Creditors.**—Elsewhere I have given an example of a composition with creditors (pp. 303-4). It occurs when a man has not the means of paying his debts in full, and, wishing to avoid the Bankruptcy Court, he calls his creditors together and persuades them to agree to take a smaller sum than is due to them—ten shillings in the pound, for example. Suppose you are one of those creditors, and the debtor owes you £20, you agree to take £10 in full satisfaction. Here there is no dispute as to liability, as there is in case (b), given above, and yet, having agreed to accept half your debt, you are bound by the agreement.

Now, this is not because you are to receive £10; because, as I have said, it is no satisfaction of a debt to accept a smaller amount. What, then, is the consideration which makes the composition binding? It is the agreement by the other creditors to accept a composition. Your promise is, "If Debtor pays me £10, and Jones, Brown and Robinson will accept ten shillings in the pound, I will release Debtor from the payment of the rest of his debt to me." Jones, Brown and Robinson consent to this, and so the consideration is not a benefit to you, but a detriment or loss to them; and the agreement is not a two-sided, but a triangular one—the debtor is on one side, you on the second, and the other consenting creditors on the third.

So much for the value of the valuable consideration. A further point remains for discussion—a point of practical as well as philosophical interest. Let me begin to discuss it by stating it in dogmatic form, as follows:—

**Valuable consideration may be present or future, it must not be past.**—It may also be put in this way: Past consideration is not valuable consideration. I have often insisted, in this chapter, on the statement that consideration is a *quid pro quo*: it is the thing you get in return for your promise; it is the benefit you have stipulated for yourself, or the loss or risk you have persuaded the other party to take upon himself.

I have more than once seen agreements drawn in this form:—

"In consideration of Mr. P. J. Plum having lent £20 to my brother, John Thum, I promise to pay Mr. Plum £20 on the 10th of June next, if my brother John has not paid it before that date.  
(Signed) THOMAS THUM."

Note the words "having lent." The circumstances are that John Thum

borrowed from Mr. Plum, and afterwards Plum, meeting Thomas Thum, informs him of the loan and asks him to guarantee the sum. Thomas consents, and the above document is drawn up and signed. If you examine this transaction with care and attention, you will see that Thomas Thum really had no consideration for his promise at all. I say this, not because the loan was made to his brother John—that is not the point. If Thomas had asked Plum to lend John £20, saying, "I will be responsible for its repayment," Thomas would have been legally bound to Plum in a debt of £20, although he (Thomas) had not received a penny for himself. If you bear in mind what I have previously stated, you will at once see the reason: it is because Thomas would have induced Plum to part with money—no matter to whom—in reliance upon, or in exchange for, Thomas's promise to pay it back.

But in the example given above, it cannot be said that Plum lent the money to John, relying upon Thomas's promise to guarantee it, because Thomas did not give the guaranty until after the loan had been made. It is clear, therefore, that the promise of guaranty is purely gratuitous and voluntary; and the rule is that such a promise (with one exception—see page 286), being without valuable consideration, is not enforceable by the English law. It is, of course, a moral obligation—a debt of honour—and if Thomas Thum pays the £20 to Plum, he cannot ask for it back; but, on the other hand, if he does not keep his word, Plum has no legal remedy.

You have no doubt carefully noticed the fact that I have just stated, namely, that if Thomas had asked Plum to lend money to John, the case had been different. An agreement in the following terms, for instance, would be good in law:—

"In consideration of you having, *at my request*, designed and constructed a steam launch, I promise to pay you the sum of £125.

(Signed) HENRY HAY.

"To MR. KENNETH KAY."

A moment's consideration will show you how this is so. If you ask a man to work for you, without mentioning the exact amount of remuneration, or even without mentioning that any remuneration at all is to be given, the legal presumption is that you intended to pay, and he to accept, a fair and reasonable sum for his labour. Suppose, then, that after the work is finished, you cannot agree on that reasonable price, the only method by which the labourer may secure his hire is by calling on a judge or jury to fix the amount; but if you and he like to fix it yourself by mutual consent, the sum agreed upon is to be taken as the amount you have agreed to be reasonable, and to that amount he is entitled.

The most extraordinary case of the kind recorded in our books is that of a man named Lampleigh, who lived in the reign of the wisest of fools—James I. of England and VI. of Scotland. Lampleigh had, or was supposed to have, some influence at Court, and he was asked by a person of the name of Brathwait to use that influence, and generally to exert himself to procure the royal pardon for a condemned criminal. Lampleigh did exert himself, and made one or two journeys to Newmarket, whither James had betaken himself and his Court, at considerable expenditure of time and money; but despite his importunities,



the royal clemency was not extended to the doomed man. Brathwait, however, being satisfied that Lampleigh had used his best endeavours, promised to pay £200 as remuneration for what had been done, but soon altered his mind, and declined to pay anything at all. Then Lampleigh brought his action for the £200, and was met by the objection that the promise to pay that sum was made for a past consideration—that is, no consideration at all, because Brathwait did not say, “If you will do your best to obtain a pardon I will give £200,” but, “You having done your best to obtain a pardon, I will give you £200.”

The question was argued at great length, with all the logical acumen of the English lawyers who flourished in the days of Coke and Bacon, and in the end it was decided in favour of the plaintiff. The judges affirmed the doctrine that if you do something useful for me of your own accord without being in any way asked to do it—“a voluntary courtesy” they called it in the formal style of those days—you cannot claim payment (*see* p. 265), and if I afterwards promise to reward you, it is a promise only morally binding. But if you ask me to serve you, I am entitled to remuneration, and the subsequent promise is only fixing the amount, and is legally binding.

**Marriage as a Consideration.**—Perhaps no better illustration of the doctrine that past consideration is not valuable is to be found than in considering marriage as a consideration for a promise. I do not mean a **promise** of marriage as consideration for another promise of marriage. I mean the actual marriage as consideration for a promise—for instance, to give money. It is an axiom of English law that marriage is the highest of all considerations, and it is easy to see why this is so. If you ask anyone to do an act of an ordinary character, promising that you in return will pay something or perform a service, and, after the other party has done what you asked him to do, you fail to carry out your part, as a rule the matter is not altogether irremediable. But if you induce a woman to marry you by promising to settle a provision upon her as soon as she has become your wife, she has put herself in a position whence there is no escape, and if you do not carry out your share of the bargain, she is unable to cancel her part, or to resume the position that you induced her to quit, for she cannot become a single woman again. It is, therefore, always said by judges and lawyers that marriage is the highest consideration known to the law.

Now, this statement only applies to a contract in consideration of a future marriage. Thus, if Mr. Spows agrees with Miss Blossom that on the day she marries him he will settle upon her £200 a year for life, he is legally bound to make the settlement the moment after the lady becomes Mistress Spows. But if, as frequently happens, there is no contract of that kind made before the marriage takes place, and after it takes place the husband makes a promise to settle money on his wife in consideration of the marriage, the contract is void, because the consideration is a past act.

**Contracts made by deed** are an exception to the rules of the general law relating to agreements in more than one respect. A deed is a document in writing which, in England, must be sealed with the seal of the person making

it, and in Scotland need not be sealed, but must either be signed by the maker or written by him; and in Scotland, though not in England, there must be two witnesses. In both countries a deed is an instrument of very great legal solemnity, and is used for conveying land and in many other transactions of great importance. On pp. 287-9 will be found a list of transactions which *must* be by deed, but there are others which *may* be. By English law, if a man makes a proposal—that is, an offer of a contract—by deed, he cannot revoke it. As I have stated on page 260, in ordinary cases you can always revoke an offer at any time before the other party has accepted it; but if you make an offer by deed it is binding upon you unless and until the other party has rejected it. There is a great case on this subject, in which an underwriter, who is a man whose business it is to insure ships and their cargoes against loss at sea, executed a deed of insurance—it should be noted that all contracts of marine insurance must be in the form of a policy, and a policy is always a deed. The owner of the insured ship did not know that the policy had been executed, and, in fact, had made no contract with the underwriter; but after the ship had been lost he heard, in some way, that such a policy had been executed, and was lying in the underwriter's safe. He thereupon demanded the insurance money, and, when it was refused, brought an action. What is more to the purpose, he succeeded; and the case established the two following legal propositions—namely, (1) That a promise under seal is binding, even if the person to whom you make the offer of the promise did not know you had made it—in other words, that you cannot revoke an offer made by deed; (2) That such an offer is binding on the offerer until the other side rejects it. This is rather a startling proposition, and shows the extraordinary efficacy of a deed. According to English law a deed, in order to take effect, must be delivered. It is somewhat difficult to define delivery, but you may take it that if you give a deed to the other party, or to someone on his behalf, that is a sufficient delivery, and it is also sufficient if you make a declaration that you have delivered it, even though you actually keep it in your own possession. The next time you are called upon to execute a deed you will see, probably at the end of it, the following words: "Signed, sealed, and delivered by the said X Y." If you then sign it and seal it you have delivered it, because you have declared that you have delivered it. Such was the case in the contract of marine insurance referred to above. The underwriter had, in fact, kept the deed in his own possession, but he had signed and sealed it, and the deed itself said "signed, sealed and delivered" by the underwriter. Now, you may easily see how awkward it might be for you if you executed a deed in circumstances similar to those of the underwriter's case. Let me tell you how to avoid the difficulty. If you want to make a contract with a man, and for some reason have to execute the deed before all the negotiations have been finished, you may do it in this way: deliver the document into the hands of your solicitor or some other agent, and tell him not to part with it until such-and-such conditions have been fulfilled. The delivery, then, is not absolute but conditional, and the deed is said in legal language to be an *escrow*. Then, when the other party fulfils the conditions, the delivery becomes complete, and the deed becomes



binding. But if he refuses or neglects to fulfil the conditions named by you to your agent, you are not in any way bound, because, as the deed does not take effect until it is delivered absolutely, and this deed has not been delivered absolutely, therefore it is of no effect. This kind of conditional delivery is of everyday occurrence. For instance, if you are selling a piece of land, you will have to make a conveyance of it by deed. In the ordinary course of events you will sign and seal, and then deliver the document to your solicitor, telling him not to part with it until he has received the purchase money. By taking this very simple precaution you secure that the land shall not become the property of the purchaser until he has paid for it.

There is another point upon which contracts under seal differ from ordinary contracts. It is this:—a promise purely voluntary and gratuitous—that is, made without any valuable consideration—is binding. Take a case of this kind: You have done me a service without any request on my part, but none the less of considerable value to me. I want to reward you for that service, and so I make a promise to pay you an annuity of £52 a year for the rest of your life. If I just give you that promise by an ordinary writing or by word of mouth, it is not binding on me, because the consideration is past; and so, if I really want to make it a legal and not merely a moral obligation, I ought to make the contract by deed. The reason for doing this is, that although I might and should consider myself as much bound by a moral obligation as a legal one, yet I might die at any moment, and the people to pay the annuity would be my executors. Now if the promise were made by deed my executors would be bound to fulfil it, but if it were not made by deed they would not only not be bound to pay, they would not even be entitled to pay. Why not? Simply because it is the duty of executors only to pay legal claims on the deceased man's estate. They are not concerned with debts of honour. For instance, unless all the persons interested under the will gave their consent they would not be entitled to pay the testator's gaming debts, or, in fact, any debt other than a legal one. The other difference between ordinary contracts and contracts under seal is this: that a debt due under an ordinary contract is barred at the end of six years from the date when it becomes due and payable. There is, however, this exception—that if the debtor makes a payment on account, the six years starts afresh from the day of that payment, or if he acknowledges the debt in writing so that you may infer a promise to pay, the six years begins again from the date of the written acknowledgment. In the case of contracts under seal, however, the time is not six years, but twenty. So that in this respect also a formal contract is more advantageous to the creditor than an informal one.

**When it is necessary to make a Contract by Deed.**—It is not often absolutely necessary to make contracts by deed. Of old it was, and the inconvenience of so much formality was not much felt, probably because contracts, except those immediately to be carried out, were not in great use. But with the development of trade and commerce it became absolutely necessary to allow contracts to be made in any way whatever, so long as the parties actually agreed.

There are, however, a few contracts which must be by deed, according to English law, and these are:—

(1) **Contracts by Corporations.**—The word “corporation” comes from the Latin *corpus*, a body, and is always used in law to signify a body of persons having a legal existence quite separate and apart from that of the individuals who compose it. Take, for example, the University of Oxford. That learned body is a legal person. It is composed of Chancellor, Masters and Scholars; but the University, as a University, is quite independent of the persons who at any particular time happen to compose it. Within itself it is a shifting body, of which the particles die out and are succeeded by other particles, but to the outside world it is a permanent body. The debts of this undergraduate or the wrongs committed by that Master of Arts are not the debts or the delicts of the University; nor could the private property of those gentlemen be seized to satisfy the debts of Alma Mater.

I shall discuss this matter more fully when I deal, on the one hand, with Persons with Limited Contracting Power (section IV. of this Chapter), and in Chapter V., on Limited Companies. The bodies I am now dealing with are corporations, not limited companies; such, for instance, as Borough, City, County, District and Parish Councils, Boards of Works, Vestries, Poor-law Guardians, and other bodies of a similar nature. It is of the utmost importance to know that these bodies cannot make a binding contract unless it is sealed with their common seal. Each corporation is required to keep a common seal, and this must be set to all their contracts (except those described at the foot of this page).

There was the case of a contractor named Charlton, who, some years ago, undertook to execute some local improvements for the Corporation of Ludlow. The contract was not sealed with the seal of the Corporation, and though he work was undoubtedly ordered by the Town Council and executed by Mr. Charlton, the latter was held not entitled to sue for the money.

Other cases are the following:—Mr. Arnold received, or thought he received, the appointment of attorney to the Corporation of Poole, but because the contract was not under seal he was held not entitled to recover his salary. A similar thing occurred to Mr. Austin, whose appointment as clerk to the master of the Bethnal Green Workhouse was made by resolution and entered in the minutes, but his contract of service was never sealed with the seal of the Guardians of Bethnal Green.

Now there are, as I stated above, some exceptions to the rule that contracts by a corporation must always bear the common seal. One is, that trivial contracts of everyday occurrence and necessity need not be so made. This is on the ground that the inconvenience of such a course makes it imperative to relax the general rule. Suppose, for instance, there is a heavy fall of snow in Birmingham, and it becomes necessary to take on a couple of hundred scavengers to clean the streets, how absurd it would be if there had to be two hundred written contracts, each sealed with the corporation seal of the Midland metropolis!

The next thing is, that where a corporation is formed for a specific trading purpose, it can make all contracts necessary for that purpose without a seal being affixed. If it were not so, the result might be absurd. The London and North-Western Railway Company, for example, is a corporation formed for the purpose of transporting goods and passengers. If they were not allowed to make their



ordinary trading contracts for carrying merchandise and passengers except under their common seal, it would mean that every railway-ticket would have to be about a foot square, for only thus would it be capable of receiving the impress of the company's seal.

But suppose the London and North-Western Railway Company wished to appoint a new managing-director or secretary, their contract with that fortunate individual would have to be made in the most formal way, because it is not one of those contracts which it is the very object of the company's existence to make. The corporation exists for the purpose of making contracts of carriage.

It is the safest plan, in entering into a contract of any magnitude with a corporate body, to insist on the common seal of that body being affixed to the contract. If you do not take this precaution you may find yourself in the unpleasant predicament of being unable to get payment after you have done all the work.

*Bills of Sale* must also be under seal—that is, by deed. I do not intend, however, to trouble you with these transactions in the present chapter; they will be dealt with in a more appropriate place when discussing the subject of Borrower and Lender (*see* Book IV.).

(2) **Transfer of Sculpture with Copyright.**—The Act of Parliament which gave to sculptors the right, commonly called copyright, in their own artistic creations, enacted that when a sculptor wished to transfer his work and copyright to another, he must do so by deed. Copyright, let me explain, is simply a monopoly or sole right of reproduction; and by the Act above referred to it is made unlawful for anyone to sell reproductions or copies of a sculpture without the licence of the sculptor. When the artist sells (or gives away) his work, he can do one of three things:—(a) He can keep the copyright, though he has parted with the work; (b) he can pass the copyright on with the sculpture; (c) he can altogether lose the copyright; and, I may add, it is not an uncommon occurrence for a sculptor to lose his copyright without knowing it.

If you be one of the gifted race that makes the cold block of marble shapely in form and instinct with life and movement, and are wishful to enjoy the full benefit of your skill, be very careful what you do when you sell your work. For if you merely sell the sculpture without mentioning the copyright, that copyright has gone for ever, and anybody who chooses may make and sell copies of your Venus Aphrodite without so much as saying "By your leave." If you want to sell the copyright along with the sculpture, you must expressly say so in the deed of sale; and if you want to sell the sculpture and keep the copyright for yourself, you must, again, in the deed by which you sell the sculpture particularly mention that you retain the copyright.

(3) **Transfer of Shares in Companies** are very often required to be by deed. This is not always so. In some cases it is sufficient to use a written document which is not a deed. Which of the two forms is necessary depends entirely on the Act of Parliament, Charter, Letters Patent, Articles of Association, or other thing under which the company is incorporated. Still, if you buy shares that ought to be transferred by deed, and omit the necessary formality, you have always a legal right to compel the seller to execute the deed required to complete the transaction.

But until the legal solemnities have been accomplished the company will not register you in its books as a shareholder, nor will you receive your dividends.

(4) **Transfer of a British ship** or a share thereof.—By the Merchant Shipping Act passed in 1854 it was made compulsory to transfer British ships and shares in such vessels by a bill of sale, which is by deed. A British ship is one which is registered in the books of the Custom House of a British port, and is therefore entitled to sail the seas under the Union Jack. It may be news to some of my readers to know that no foreigner can lawfully be the owner or part-owner of a British ship, this privilege being exclusively reserved for the subjects of Queen Victoria. Whenever either a whole vessel or a share in one is transferred from one person to another, the deed of transfer has to be registered at the port to which the ship belongs, the person who keeps the registers being the chief Customs official in that port. A ship, even if owned by British subjects, is not entitled to the protection of the British flag unless it is properly registered.

In connection with this exclusion of the foreigner from the ownership of British ships, I may perhaps allude to the historical fact that until the year 1870 it was not legal for any foreigner to own land in England. This was based on the old feudal law, by which all the owners of land in any particular district or country owed allegiance to the lord or king of the district or country, and were required to follow him in war whenever called upon to do so. Indeed, until the reign of Henry VII. in England, and for quite a century after that date in Scotland, the landowners and their vassals formed the whole of the land forces of the country. Service in arms was, in fact, the condition upon which they held their land. Now, it follows that as no foreigner could be called upon to serve the king in war—seeing that the war might be against his own country—therefore no foreigner could own land in England. When, under William III., a standing army became the rule, the reason for the old law vanished, but the law itself was not repealed until two hundred years afterwards, by the Naturalisation Act, 1870.

(5) **Licences for the use of Patented Inventions.**—It is common knowledge that anyone who invents a new and useful art, manufacture, or process, may patent it. This is really for the encouragement of invention by securing to the inventor the benefit and profit of his ingenuity and perseverance. Now, nobody may use a patented invention except by the leave of the patentee; and when the patentee gives leave to anyone to make or sell his invention, such leave is called a licence. By law, in England, such a licence must always be by deed under the seal of the patentee; so that you ought to be careful, when you use an invention for profit, to get the licence in proper form. If you do not, you will be stopped by injunction [interdict] from the Court, your goods made in defiance of the patent law will be confiscated, and you will be liable to pay damages.

Having considered affirmatively those things which are necessary to make a contract, now let us look at the negative side of the question, and see what things you must not have if you want your agreement to be enforced by a court of law.



## SECTION II.

## THINGS THAT MUST BE ABSENT FROM CONTRACTS.

Contracts contrary to Act of Parliament—Cheating the Exchequer—Sunday trading—Gaming and wagering—The man who holds the stakes—Paying another man's bets—Betting with, and loans to infants—Stock Exchange speculations—Insurances without interest—The Truck Acts—Printer's contracts—Selling drink on credit—Contract to commit a crime or wrong—To print a libel—Preference of creditors—Contract against the public policy—Injuring the country in foreign relations—Contract with a foreign foe—Prejudicial to good government—Government's servants' salaries—Bribery—Refusing to give evidence—Sharing the spoils—Maintenance—How far you may assist a litigant—The case of Mr. Bradlaugh—Compounding an offence—The sacredness of marriage—Matrimonial agencies—Contracts in restraint of trade—Not to set up business in opposition—Such contracts must be reasonable—Immoral contracts.

LET me state shortly and at once that your contract must not be—

- (a) Against an Act of Parliament ; or
- (b) For the perpetration of a crime or wrong against another, either directly or indirectly ; or
- (c) Against public policy or the common weal ; or
- (d) Immoral.

(a) Now, it would seem almost impossible for anyone to imagine that one could make **contracts contrary to Act of Parliament** ; but what I mean is, contracts to evade an Act of Parliament. Let me take, for example, this case : A is about to make a journey to France, where cigars are cheap, and B says to him, "If you will manage to smuggle me in some cigars, I will pay you whatever you give for them, and a little commission." A returns from France with about £5 worth of the fragrant weed concealed amongst his luggage, and successfully eludes the vigilance of the Custom House men. Then B declines to take the cigars, for some reason or other. Either they are as execrable as French cigars usually are, or B's conscience pricks him for having allowed himself to defraud the revenue of his country, or he has simply changed his mind. The reason does not matter—the fact remaining that B declines to carry out his promise of buying the smuggled cigars from A. A is quite powerless to obtain any redress, simply because no court of law would dream of enforcing a contract the main feature of which was a plan to cheat her Majesty's Exchequer. And so A will be left with the cigars on his hands. Again, B may actually take the cigars without paying for them on the spot, and when A applies for payment, may snap his fingers and refuse to give a single farthing. Even then A has no redress, because if he brings an action for the price, the fact that this was a smuggling contract will be sure to come out, and such a contract the courts of law cannot enforce.

Let me now deal specifically with

## SOME CONTRACTS CONTRARY TO ACT OF PARLIAMENT,

which cannot, therefore, be sued on, or, in other words, are of no legal value ; and first a word about

**Sunday trading**, which is a subject not free from difficulty. I would have

you notice, by the way, that whenever we have to deal with Statutes, as distinguished from the Common Law which has been built up for ages from the traditions and habits of the people, we pass into the region of refinements and quibbles. The reason is plain when we consider that in one case the judges are guided by broad principles, and in the other only by the words of the Act, taken in their most literal and most restricted signification. The interpretation of Acts of Parliament by judicial authority must always be narrow and literal, because the only clue to the intention of Parliament is that afforded by the words of the Statute; and the judges say, "We are not at liberty to say what we think Parliament meant to say. All we can do is to carry out what it actually has said—no less, but no more."

A good example of this strictly literal interpretation is to be found in the decisions of the judges on Sunday trading. An Act of Parliament says, "No tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's Day (works of necessity and charity alone excepted)," under penalty of a fine; and further, all contracts by such persons as are included in the Act, in their ordinary callings, are absolutely of no binding value if made on Sunday—unless they are of necessity. I make bold to say that an ordinary man reading this part of the Statute-book would say, if asked his opinion on the point, that everybody was included in the words of the Statute, because of the words "other person whatsoever." If you are not a "tradesman, artificer, workman, or labourer," you are surely some "other person whatsoever," and therefore it is unlawful for you to exercise your worldly calling upon the Lord's Day.

And that is where *the ordinary man would be mistaken*. Whenever you see general, vague words in an Act of Parliament, following after precise words, the general, wide expressions are limited within the scope of the precise words. If it were not so, think of the absurdity of the Act itself. For if "any other person whatsoever" meant literally every person subject to the law of England, where in the world is the sense of first saying, "tradesman, artificer, workman, or labourer," seeing that these would be included without mentioning them specially? It would be like saying to a beggar, "I will not give you either bread, or cheese, or meat, or a halfpenny, or a penny, or a shilling, or anything to eat, or any money whatsoever." Such a speech would be simple rubbish. You ought to say at once, "I will give you neither food nor money." Now, the judges always try—and they have to try very hard indeed sometimes—to make some sort of sense out of the words of an Act of Parliament, and as it would be making nonsense of it to make "other person whatsoever" include everybody in the kingdom, they say, "It must mean any other person whatsoever of the same kind as, or exercising vocations similar to, those of the tradesman, artificer, workman, and labourer before alluded to."

Thus, a horse-dealer who bought a horse on a Sunday was not allowed to sue for breach of contract when the animal turned out to be a jibber, a roarer, and the possessor of every other kind of equine vice. A horse-dealer may not be exactly a tradesman, but he is so like one that he comes within the words "other person." On the other hand, a farmer, though exercising his ordinary calling on Sunday, is not within the Act, because he is neither tradesman, artificer,



workman, nor labourer, nor is he any "person whatsoever" of the same kind. The only one of the four classes mentioned whom the farmer can be said to resemble is the tradesman, because just as the tradesman buys and sells, so the farmer must, in the ordinary course of business, buy such things as seeds, manure, etc., and must also sell the produce of his farm. But a very little reflection will show how unlike the farmer is to the tradesman. The latter merely buys and sells. He is a middleman pure and simple. The farmer, on the other hand, is a producer. He buys and sells, it is true, but he does not sell that which he buys, as the tradesman does. In fact, the essential business of a farmer—that which occupies most of his time and attention—is growing his crop. And so a farmer is not within the Lord's Day Observance Act, and he can reap and sow, buy a horse or sell a haystack, on Sunday just as on any other day, without fear of legal consequences. The same kind of observation would apply to a solicitor, a doctor, a chemist (probably), an author, a journalist, and, in fact, to all professional men.

Having in some measure ascertained the persons to whom the Sunday Act applies, let us see how far it applies to those persons. Observe, please, that the words are: "worldly labour, business, or work of their *ordinary callings*." In accordance with the principle recently laid down, this phrase is interpreted strictly, so as not to include work done or contracts entered into by tradesmen, artificers, workmen, labourers, and the like, unless done in their ordinary way of business or work. Thus, a grocer who contracted to buy a horse on Sunday could enforce the contract, but not if he contracted to buy a hogshead of sugar. On the other hand, a horse-dealer who contracted to buy a horse on Sunday could not enforce the agreement, though he would be quite entitled to sue for a contract to sell a hogshead of treacle.

Let me remark, by the way, that it is not under this Act that a master of a factory or workshop is forbidden to allow his men to work all seven days in the week. That regulation is under another Statute altogether, and will be dealt with when I come to treat of factories and workshops.

It should further be noticed—and this will sound strange to English ears—that this law anent Sunday trading does not apply to Scotland, where a contract made on Sunday is as valid as one made on Saturday or Monday.

**Gaming and Wagering Contracts, or Bets,** are also contrary to Act of Parliament. They are not illegal, in the proper sense of the word, but they are void. Let me explain the difference. When any act or any contract is forbidden by law it is illegal. Thus, if I employ Scribe, of Grub Street, to write a libel on you, libels being forbidden by law under pain of punishment, the contract to write a libel is illegal, because if Scribe carries it out he becomes a libeller. But when an act or a contract is merely void, the law says, "We will not punish you for it, but we disapprove of it to this extent, that we will not countenance it."

Thus, there is nothing illegal in us two making a bet on the Derby, so long as neither of us keeps a place where the public may resort for purposes of betting. If you lose and pay me, I can keep the money; but if you lose and do not choose to pay, I have no means of compelling you to do so. That is what I mean by saying that a bet or wager is void at law. The law will not assist the winner to collect his debts.

While I am on the subject of gaming and wagering, I should like to treat of one or two matters connected therewith. The first is, *the position of the stakeholder*. For the information of such of my readers as may be ignorant of sporting terms, let me say who the stakeholder is. Suppose Stones and Bones are betting on the University Boat Race. Stones fancies Oxford to win, and Bones is inclined to "back" Cambridge. And so they make a bet of a sovereign—Stones saying, "I'll back Oxford for a pound," and Bones accepts the proffered wager. Then they each deposit a pound with Dones, upon the understanding that if Oxford wins, the two sovereigns are to be paid to Stones; if Cambridge wins, to Bones. Dones is what is called the stakeholder, because the money which he holds is "the stakes."

Now, suppose Oxford should win, Bones has lost his bet, and it becomes the duty of Dones to pay the stakes to Stones. If he does this at once, there is an end of the matter. But it may happen that Bones repents his folly in making the wager, and, even after the race has been rowed, he demands his money back from the stakeholder. The latter must return him his sovereign, unless he has already paid it over to Stones, the winner. You see what I mean: either wagerer can demand his money back at any time before it has been paid to the winner; but after it has been so paid, he has not a word to say.

What happens if Bones demands his money from the stakeholder, and the latter, disregarding the demand, gives it up to Stones? So much the worse for the stakeholder. He will have to pay out of his own pocket, and he cannot get it back from Stones. Let me tell you of an actual instance. A certain Mr. Hampden, a man with peculiar notions of geography, made a bet of £100 that the world was flat. The decision of the question was to be left in the hands of some eminent men; in the meantime each party to the wager deposited £100 with a Mr. Walsh. The eminent personages met, and with all solemnity decided that the earth was round, whereupon, according to all the rules of wagering, Mr. Hampden lost his £100. But that gentleman was dissatisfied with the award of the men of science, and demanded from Mr. Walsh his £100 back. Mr. Walsh declined to accede to the request; but, instead, paid over the whole stake to the winner of the bet.

Upon this, he who had imagined the earth to be even as an immense pancake, took action in a court of law against the stakeholder. He argued—or his counsel argued for him—thus: "This contract was simply a wager, and therefore void. The winner could not have brought an action to recover the £100 that he won, and therefore Walsh was not bound to pay him the stakes." That being so, and as he had no personal right to the money, the £100 still, in law, belonged to Hampden, and he was entitled to it on demand. Observe, please, that if, immediately the point was decided, Walsh had paid the whole stake to the winner, Mr. Hampden would have been helpless. So much for the stakeholder.

There is another point I would like to urge in connection with betting, and that is with reference to **paying bets for other people**. Let me especially warn you *never to pay a bet out of your own pocket for another man*. The thing happens in this way: Your friend Fastman comes to you some day and asks you to be good enough to do him a favour, which is, to call on your way down High Street and pay a "fiver" for him to Blink. He (Fastman) is short of money



to-day, but he will make it all right with you in a day or two. Suppose that you, willing to oblige your friend, call at Blink's office in High Street, and pay him £5 on behalf of Mr. Fastman. In the ordinary course of events, that makes Fastman your debtor for five pounds—as lawyers say, for money paid to his use.

But suppose the £5 was in payment of a bet or wager which Fastman had lost to Blink, the case is entirely changed. You cannot sue Fastman for a penny of it—in other words, when you, out of your own pocket, pay another man's bets at his request, the other man need not, legally, repay you what you have expended for him. Now, if you look at the illustration I have given above, you will see that Fastman, when he asked you to pay £5 to Blink, did not tell you what it was for, and you did not ask him. That makes no difference in the world. If, as a matter of fact, you pay a man's betting or gaming debt for him, you have no legal right to demand repayment of the sums you have paid, whether you were aware of it or not. You ought to have asked. If you had, and were told the truth, you paid the money with your eyes open; if you were told a lie, then you can bring an action to recover damages for fraud, because you have paid away your money under a misrepresentation made on purpose to deceive.

The remarks I have made about bets apply also to gaming debts, such as money lost at cards or billiards.

I next want to consider the position of the betting agent, or, as he generally calls himself, *the turf commission agent*. This gentleman earns a living by arranging bets between other people, just as a stockbroker does not necessarily buy or sell stock on his own account, but makes deals for his customers. Suppose you want to make a bet on the Derby. You select your horse—Peter the Hermit, let us call him—then you go to one of these turf commission agents, take him £5, and say, "I want to put this on Peter the Hermit." The agent takes the money, goes to a bookmaker, who is a man who bets on his own account and not for other people, and makes a bet with him on your behalf to the extent of £5 at the current odds. For just as stocks and shares go up and down in the Stock Exchange, so do the odds go up and down in Tattersall's ring. After the race is over, if your horse has won, your agent calls on the bookmaker and collects the winnings, while if your horse has lost, the bookmaker calls on the turf commission agent to collect his winnings.

Here I wish to draw attention to the anomalous position of the agent. If Peter the Hermit does not come in first, you can refuse to pay what you have lost. If the turf agent has any money of yours in hand—*i.e.* if it is a cash transaction—you can order him not to pay; and if he does pay with your money, though you did not order him not to, you can recover your money back from him. Again, if it was a credit transaction, and he pays the winner and then asks you for the money, you can refuse to pay, and he cannot sue you, because it is a gaming debt. But if your horse wins, and the bookmaker pays the turf commission agent, you can compel the latter to hand over the winnings to you. So that the turf commission agent's position is an anomalous one; his lot is what sailors call "monkey's allowance—more kicks than halfpence." For if you lose, he is bound to pay the bookmaker or his business would be ruined, because

no other bookmaker would trust him ; and he cannot recover from you. At the same time, if you win, and the agent receives the winnings, you have a legal remedy against him. Of course, if the bookmaker does not pay the agent, you yourself are powerless, because your only right against the turf commission agent is that he shall pay you what he receives on your behalf.

The old law on the subject was very different. Until the early part of the nineteenth century, betting and gaming contracts were enforceable at law. The first sign of the modern spirit was displayed when the judges began to express their dislike of the practice. They frequently protested against the Courts being turned into theatres for the decision of wagers, the judges simply being umpires to decide whether bets had been fairly won. They did draw the line somewhere, for they refused to hear cases where indecent subjects were betted on—as, for instance, when two fools made the following bet :—“ A wagers £100, to be paid to B if it turns out that Count Blank is a female, in consideration of B promising to pay A £100 if it turns out that Count Blank is a male.” We can hardly imagine in these days anyone having the presumption to ask a court of law to decide a bet like that ; and the Courts of that day refused to entertain the claim, because it was indecent. But it was not until 1845 that the protests of the Bench were effectual, and Parliament passed an Act declaring that no wager should be enforceable at law. Hence, bets and gaming debts are now purely voluntary. You need not pay if you lose, neither is the other man obliged to pay you if you win. A turf commission agent has no legal help in carrying on his business, for he cannot even sue you for the commission he charges on your winnings.

There is another matter connected with gaming and wagering that will be discussed at greater length in the Chapter on Bills of Exchange and Promissory Notes—namely, the giving of bills and notes in payment of gambling and betting debts. I wish to state the rule here, however, and it is this : If you give Jones a cheque, or bill, or note, in payment of such a debt, Jones cannot bring an action against you on the cheque, etc., if it is dishonoured, but if he parts with it to Smith, who gives money or money's worth for it, and who does not know that it was in settlement of a gambling transaction, Smith can make you pay the amount.

**Betting with, and loans to infants** are void even to a greater extent than in the case of an adult ; for, as I have shown in the preceding paragraph, if an adult pays his gaming debts or bets by cheque or note, and this cheque, etc., comes into the hands of a third person who gives value for it, and does not know that it was in settlement of a gambling transaction, such third person can recover the amount. But if anyone bets with an infant (*i.e.* a person under twenty-one), and after the infant comes of age induces him to give a cheque, etc., and endorses that cheque, etc., over to a third person, the latter can in no case claim the money from the ex-infant.

Precisely the same observation applies to loans to young persons under age. It was found to be the case that a certain class of persons at Oxford and Cambridge made a living out of extravagant undergraduates. The *modus operandi* was the essence of simplicity. The silly young man would be approached with the offer of a loan, to be repaid “ at his convenience,” and, I need hardly say, at an exorbitant rate of interest. Very likely the poor pigeon would be under



twenty-one when he borrowed the money, but before the end of his Varsity career he would be pretty sure to have attained the age of manhood, and as soon as ever that time arrived, his creditor would persuade him to sign a bill for the amount. Even this was of no use to the money-lender himself, because as between himself and the undergraduate the debt was void; but, as I shall explain in the Chapter on Bills, Notes, etc., although a bill may be of no value as between yourself and the man you give it to, yet if it comes into the hands of a person who gives value for it—*i.e.* is sold by the money-lender to another—the latter acquires a right to the money.

So the University Shylock speedily discounted the bill, and the discounter used to threaten actions against the foolish borrower. I myself have known men of the highest promise whose careers have been blighted by the kind of thing I have described. But a Statute has been passed, aimed at those who try to make money out of youthful follies. By that Statute, a bill, note, or cheque given by a man for a loan contracted during infancy does not bind him in any circumstances. It is hoped that the result will be to scotch, if not to kill, the nefarious practices to which I have alluded, for it takes away the only method by which these bloodsuckers could acquire a legal hold of their victims.

**Stock Exchange Speculations.**—I have often heard the question asked, Why does not Parliament interfere to put down gambling on the Stock Exchange? It is assumed, as a matter of notoriety, that people do enter into gambling transactions on the Exchange, and that large sums of money are lost and won in that way. Yet we often hear of actions brought to recover "differences" won and lost in Capel Court, and we find these actions almost invariably successful. The average man asks why the law enforces these contracts when it will not enforce bets made on horse-races.

The answer lies in a knowledge of the facts. Brown has a little money to spare, and he thinks he would like to speculate on the Exchange, and so turn his hundred pounds into two hundred. So he consults Price and Smart, the stock-brokers, who say, "Put your money into Brighton A shares. They are sure to rise." So Brown instructs the brokers to buy for him fifty shares, Brighton A, which stand at, say, £150 each. The broker goes to a jobber on the Exchange, and makes a contract for fifty of these shares at the price named. This means that the jobber undertakes to sell and deliver on the next fortnightly settling day fifty shares at the price of £150 each.

I need hardly say, perhaps, that the jobber has not in his possession any such shares. The settling day arrives, and by this time Brighton A's have gone up to £152 each—which means that if you bought such shares you would have to pay £152 apiece for them. Now, the jobber has contracted to deliver them at the price of £150; so that if he is compelled to deliver the shares he will have to buy them for £152, and sell them for £150—a dead loss of £2 a share, or £100 in all. So it is all the same to him if he says to Brown, "I will give you £100, and you can go on the market and buy the shares. It will amount to the same thing." In other words, he offers to pay Brown the difference between the contract price and the market price. If Brown accepts the offer, he can pocket the jobber's £100, and need not buy any shares.

Suppose, though, that the market falls—*i.e.* Brighton A's go down to £148. Then Brown is pledged to buy for £150 what he can get elsewhere for £148. So he says to the jobber, "Keep your shares, if you like. I will pay you the difference between the contract price and the market price." The jobber accepts, and receives £100 from Brown. Roughly speaking, this is what is called a speculation in differences on the Stock Exchange. It is a speculation because neither party really intended to buy or sell, but only to bet on a rise or fall in the market price. In fact, as I have said, the jobber never had the shares to sell.

It is, then, a gambling transaction, pure and simple, and yet it will generally be enforced; and I will tell you why. Stockbrokers and stockjobbers invariably make their contracts according to the rules of the Stock Exchange. If you ever make a contract such as I have described, you will receive from your brokers a note, called a "bought note," to this effect:—

April 1, 1900.

Bought for you this day 50 Brighton A at £150 = £7,500.

N.B.—This contract is subject to the rules of the London Stock Exchange.

Now, there is a rule of the Stock Exchange by which if the buyer of stock or shares demands the delivery of what he has bought, the seller is bound to deliver the shares or stock, and if the seller insists on the buyer taking the shares, etc., the buyer must do so, and neither party can offer "differences" merely. That is, I believe, rarely done; but the rule has this effect, that it makes all transactions according to the rules of the Stock Exchange *bonâ fide* transactions, and not open, in law, to the imputation of gambling.

To show how this works out: I come to you and ask if you will sell me a thousand tons of coal for my factory at ten shillings a ton, to be delivered on Saturday next. But between to-day and Saturday the price of coal has gone up to ten shillings and sixpence, so that you are getting sixpence a ton less than your coal is worth when you deliver it. You decline to deliver it, and I bring an action for damages. What is my loss? Surely my loss is 1,000 sixpences, = £25, for if, on Saturday when you did not deliver, I had gone on the market I could have bought a thousand tons at ten-and-sixpence, being altogether £25 more than I should have had to pay you. You, therefore, can take your choice between delivering me the coal or paying me the damages—that is, the difference between contract price on the day of sale and market price on the day of delivery.

Now apply this to the Stock Exchange case. For 1,000 tons of coal substitute 1,000 shares in a company, and you will see that there is no difference in principle between the two. You say, "Yes; that is all very well; but in the case of Exchange speculations the parties never intended to buy or sell; they only intended to speculate." That may be so. But that is not what they said, and a court of law can only judge of the intentions of contractors by what they say. When, therefore, a man accepts a contract which is made according to the rules of the Stock Exchange, and by those rules the contract is really one for buying and selling, he will not be allowed to say that he meant something different. If he were so allowed it would be a fraud, for if in one particular contract a man may be allowed to plead that he did not mean what he said,



why not in another? So that, to prevent a door from being opened to all kinds of fraud, every man must be held to the terms of his agreement.

Of course, if anyone can prove beyond a doubt that both he and the other man actually agreed that in no case was the stock to be delivered, but only differences were to be paid, the Court will adjudge the transaction to be a gamble, and will refuse to enforce it. But the difficulty is to prove it, and if the contract note expressly says that the contract is made under the rules of the Exchange, the difficulty is insurmountable. Even when nothing is said about the Stock Exchange rules, it is always understood that those rules govern all transactions entered into with the members of that body. For when you go to do business in a particular market you are bound by the rules of that market, so long as they are not unreasonable; and the rule with which I am dealing is eminently reasonable.

You may take it, therefore, that when you enter upon a "deal" on the stock and share market, even though you intend merely to gamble and not to buy and sell, you will have the greatest difficulty in the world to persuade a judge that such was your intention, and even that will not be enough. You will also have to convince his lordship that the stockbroker also intended the same thing; and, more than that, you will have to prove that you and he (the broker) actually agreed upon a mere speculation and not a *bonâ fide* bargain for sale and purchase. Further, one is entitled to buy any commodity he chooses on the chance of a rise in the market; though he may not say, "I will pay you so much if the price of Consols go up, if you promise to pay me so much if they go down." Speculation is quite lawful, so long as it does not degenerate into gambling.

Moreover, you must remember that the law is the same all round. You have as much a legal claim to your winnings as the broker has to his.

**Insurances without interest are illegal** by Statute. I have already dealt with this subject in connection with life insurance (p. 115), where I have shown that you cannot insure the life of a person unless it is to your pecuniary interest that he should live. The same rule applies to contracts of *marine and fire insurance*. The person who insures a ship or cargo against loss or damage at sea must have some interest in the ship or cargo. In the case of the ship, he may be either the owner or the charterer—a charterer being someone who hires the whole or part of the ship for one or more voyages or for a certain time. In the case of cargo, the owner thereof may insure it, and so may an agent who is to be paid a commission on the sale of it; but no one who has not an interest in the safety of a cargo may insure it. As I have pointed out in the case of life insurance (p. 114), a contract of insurance is really a wager. If the person who effects the policy has an interest in the ship or cargo, it is a commercial wager which the law will sanction. Otherwise it will be an undiluted bet.

The same argument applies to fire insurance. If I insure someone else's furniture against loss by fire, what is it but a bet that the furniture will be burned during the continuance of the policy? And if I am an unscrupulous man, I may try to win my bet by causing a fire to take place. There is

very little danger of this when the householder insures his goods and chattels, because if a fire takes place he can only recover the value of what has been destroyed or injured. A landlord can insure the house, but not the furniture belonging to the tenant. A tenant can insure the building and the furniture as well. So, also, when there is a hire-and-purchase agreement, both letter and hirer may insure the property, because each has an interest in it.

The **Truck Acts** will be more properly dealt with in the chapter relating to the Law of the Workman. But I may be allowed simply to state here that all contracts to pay the wages of artificers—*i.e.* workmen, not domestic servants—in kind, or by means of cheques, are void and illegal. Such wages must be paid in coin of the realm, and not otherwise. It is also illegal to make a workman contract to deal only at certain shops, for reasons that will appear in the chapter just alluded to.

**Printer's Contracts.**—If you look at the end of this book you will see: "Printed by Cassell & Company, Limited, La Belle Sauvage, E.C." Now, there is a reason, a legal reason, why this inscription should be placed there. You will always see, either at the beginning or the end of every book, newspaper, placard, and indeed of every kind of printed matter, the name and address of the publisher. If Messrs. Cassell & Company omitted to put their name and address on every copy of the *Family Lawyer*, they would render themselves liable to a penalty of £20 for every copy sold not bearing such name and address. More than that, they would be unable to claim the price of the printing from the person who ought to pay for it.

So if you, being, say, a shopkeeper, order some bills to be printed for distribution in order to advertise your goods, the printer must put his name and address on every one of them, and unless he does so he cannot make you pay the account. I suppose the rule was made so strict in order to prevent the publication of anonymous libels, for it does not require much reflection to show how libels would increase if you could not at once find out who was responsible. Even now you cannot always discover the author of a defamatory libel, but you can, at all events, find out the printer, and make him responsible. Printers, knowing this, are more careful of what they print, and so the object of the Legislature is attained.

Before this Statute was passed, many a man was compelled to sit down under a torrent of abuse and defamation, for the simple reason that he could not discover whence it proceeded.

**Certain contracts with clergymen in England** have been prohibited by Act of Parliament. Rectors and vicars, like other men, sometimes run into debt, but they are prohibited from selling or mortgaging the incomes of their livings to pay their debts, because they are looked upon as public officers, whose income is derived from public sources, and is paid to them to enable them to perform public duties.

A rector, who was deeply in debt, made a composition with his creditors, whereby the income of the living was to be paid to a trustee. The latter was to pay first the salary of a curate, and then apply the rest of the money to paying the creditors by instalments. It was decided that this contract was absolutely illegal and void—not worth the paper it was written on.



A similar determination was come to in the case of a rector who agreed to pay a certain annuity out of the tithes of his living. There is no objection to a clergyman agreeing to pay an annuity, but he must not agree so as to encumber the living, or benefice, as it is called.

**Selling Intoxicating Liquors on Credit.**—By an Act of Parliament, commonly called the Tippling Act, the Legislature made an attempt to put down tippling contracts, so far as related to spirituous liquors. The effect of that Act, and another one passed to amend it, is this : If a publican or any other person who sells brandy, whisky, gin, rum, or other spirits sells them on credit, he is not allowed to bring an action for the price. There are two exceptions to this rule. A publican may sell on credit spirits not to be consumed on the premises, and not less than a quart at a time, and may bring an action for the amount of the bill. He can also sell on credit not less than twenty shillings' worth of spirits at one time, and has a right to sue for the price of the liquor so supplied.

An instance or two will show the scope of this Statute. Mr. Drinkhard goes into the "Cow and Compasses," and, having spent all his money, asks the landlord to let him have a glass of whisky on credit—to be "chalked-up," as the vulgar saying is. If Boniface supplies the coveted liquor without cash down, he must trust entirely to his customer's honour to pay the debt, for he has no means of recovering the debt. But if Drinkhard asks for a quart bottle on credit, the said bottle to be carried outside, and not uncorked in the taproom of the "Cow and Compasses," the price of the whisky is a legal debt.

So, also, if Drinkhard gives an order for half-a-dozen bottles at once, at (say) 3s. 6d. a bottle, the total price, since it amounts to over a pound, is a legal debt. But if the bibulous one orders one bottle, and drinks it on the spot without paying, and then another bottle, and so on, until he and his friends have drunk half-a-dozen, there is no legal debt.

This Act, as I said, applies only to spirits, not to wine, beer, porter, cider, or perry ; and until 1867, although a man could not run up a score for drinks of whisky or brandy, yet if he bought pints of ale on credit he might be sued in the court for the price of them. But the County Courts Act of 1867 enacted that no action should be brought in any court for the price of ale, porter, beer, cider, or perry which was consumed on the premises where it was supplied. This is very nearly the same as the Tippling Act, except that it is rather more strict in one way, and not so strict in another ; for the Tippling Act allows a man to order twenty shillings' worth of spirits on credit and consume them on the premises, but the County Courts Act makes no such exception in favour of those who take a quantity. On the other hand, the County Courts Act applies only to drink consumed on the premises, while the Tippling Act applies to small quantities (less than a quart at a time) to be consumed off the premises.

The practical result is this : If you send round to the grocer's or to the public-house for half a pint of whisky, brandy, gin, or rum, and the liquor-seller lets you have it on credit, you cannot be made to pay. But if you send to the public-house or grocer's shop for a pint of beer, as many people do at dinner time or supper time, the tradesman may let you run up a score and then sue you for it.

One point has not been definitely decided, and that is whether the Tippling

Act applies to the case of an innkeeper who supplies whisky, etc., to a guest staying in the inn, the liquor not being paid for at the time, but put down in the bill. When a guest staying at a hotel asks for a glass of whisky with his dinner, he is not generally asked to pay for it then and there. It is put down along with the dinner; and it is really a disputed point whether or no the hotel-keeper has the right to demand payment. For my part, I advise anyone in the position of the guest to pay quietly. It is certainly the honest course; and I think it would be twisting the meaning of the Statute to make it apply to such a case. Still, as I say, the point has never been definitely decided.

(b) It will not take very much argument to show why an agreement which has for its object **the perpetration of a crime** or a civil—*i.e.* not criminal—wrong upon another is not enforceable by law. It is perfectly obvious that if X says to Y, "I will give you £50 if you will shoot John Smith," and Y does shoot John Smith, no action could be brought for the £50. But let us take this case, one in which the money is paid first and the crime is to be committed afterwards: Mr. Glib, Parliamentary candidate for the county of Loamshire, says to Mr. Dodgey, an old electioneering hand, "Will you do a little work for me? If you will, I will give you £20." "Agreed," says Dodgey. "Then take these fifty sovereigns, go round the village of Slime-andurt, which is hostile, and 'get at' as many voters as you can; and here is your own twenty." Mr. Dodgey promises to do his best, puts the fifty in one pocket and the twenty in the other, and sallies forth on his campaign. But on his way to the village he reflects thus: "If I do this it is bribery and corruption, which is a criminal offence under the law. Our opponents are sure to hear of it, and then I shall very likely see the inside of a prison, or, at all events, be heavily fined. So I will not do it; but I won't say anything to Mr. Glib. He'll be none the wiser if I keep the fifty pounds in my own pocket." The which he does. But his employer discovers the treachery, and demands the return of the seventy pounds. Let me say at once that there is no legal way of making the agent pay it back, because if the candidate brought an action against him, it would at once appear that the agreement under which the money was paid was a contract to commit a crime, and the judge would not allow such an agreement to be put forward. He would say, "I cannot enforce in any way such an arrangement as this; and if I made the agent repay the money, it would be an indirect way of enforcing the contract to commit bribery and corruption." The moral is, that if you are a party to an agreement to commit a criminal offence, you cannot expect the law to help you, directly or indirectly.

Here let me draw a distinction and point out a difference. If I pay you money or hand over property for a criminal purpose, and then I repent and order you not to commit the crime and to return the money or property, you must obey my order. This is a case that happened: B was a man in financial difficulties, who expected that at any moment his creditors might swoop down upon him and make him a bankrupt. Naturally, he was much perturbed in mind, for the workhouse stared him in the face. So he thought of a plan whereby to save something from the wreck—which was to hand



over a lot of his property to a friend, to be concealed until the storm was over. The friend consented to become a party to the transaction, which was neither more nor less than a deliberate fraud on the creditors of B, and accordingly the property was handed over. But in a little time B saw the error of his ways, and bade the friend restore the property to him, to take its chance with the rest. Then was displayed the quality of the friend's friendship, for he absolutely refused to restore one single pennyworth of the stuff. He had an idea that B dare not go into a court of law to claim it, and that, even if he did, the judges would not listen to the claim. The precious rascal was mistaken on both points. B did go into court, by bringing an action to demand his property; and when the defendant set forth the nature of the transaction and why the property had been handed over to him in the first place, the judges decided in favour of B. "Here," they said, "is a man who intended to be dishonest and to swindle his creditors if he could. But he has not, in fact, swindled them. He has repented of his evil design, and wishes to cancel the dishonest arrangements he had made; and in so doing the law will assist him. He is not asking us to enforce a criminal agreement, nor to punish the defendant for not carrying it out; but he demands that the criminal agreement shall be rescinded, and that he shall be put in the same position as he was before he made it—namely, in a position to sell all his property to pay his creditors."

So judgment went in favour of B; and the moral to be drawn from this case is, that you will at all times be assisted by the law to put a stop to the further progress of a criminal contract, although you may have to disclose to the court an original wrongful intention.

And not only is a contract for a criminal object utterly void and of none effect, but also one for the purpose of carrying out a civil—*i.e.* non-criminal—wrong. The distinction between a crime and a mere wrong ("tort" or "delict" it is called by lawyers) is this: the former is punishable by fine or imprisonment, and the latter only by damages—that is, by paying to the person injured a sum of money by way of compensation. Some acts are both crimes and wrongs—as, for instance, libel, and assault and battery; but, as a rule, the dividing line between the criminal and the mere wrongdoer is that while the former acts intentionally, with the express intention of committing a crime, and with the knowledge that his act is wrongful, the latter may act from a mistaken notion of his rights, or simply with negligence.

Thus: If I take your umbrella with intent to deprive you of it, and knowing that it is not mine, I commit theft, which is, as everybody knows, a crime. But if I pick up your umbrella and carry it off in mistake for my own, or thinking that it is mine, I am not a criminal but only a trespasser, or wrongdoer. You can bring an action against me for damages, but you cannot prosecute me and have me sent to gaol. Observe the difference: in one case there was a criminal mind, in the other a mistake, or, at most, a piece of carelessness. In only one case is negligence criminal, and that is when it results in the loss of human life. For if I negligently fire my gun at a target in my garden close to a road, not knowing that anyone is passing by,

and I miss the target and kill a chance wayfarer, it is manslaughter. Had I shot at the deceased, it would have been murder. But, as a rule, the negligent man cannot be accused of crime; he can only be subjected to an action, and made to pay for his rashness by compensating the person injured thereby.

So much for the distinction between crime and wrong. Now let us return, and see how a contract to commit a wrong is illegal and worthless in the eye of the law. Suppose you have a grudge against Naybour, and you hire Scribe, of Grub Street, to write a book in which, amongst other things, the failings of your enemy are painted in glaring colours, and he is held up to the hatred, ridicule, and contempt of the world. Such a writing is a libel, and to write and publish that libel is a wrong done to Naybour—one of the worst kind of wrongs indeed:

" Who steals my purse steals trash;  
But he who filches from me my good name  
Robs me of that which nought enriches him,  
But leaves me poor indeed."

So wrote the man who put almost everything in a nutshell. And we find in all ages of law, in every country, the man who plays the game of petty larceny with the reputations of others has been liable to punishment by law. In some countries a libeller is compelled to make a public apology, at the same time proclaiming himself a liar, the object being to prevent defamation by exposing the defamer to ignominy. In England and Scotland we punish him by making him pay a sum of money to his opponent. After this little digression into the fascinating paths of libel and comparative law, let us come back to our original road. If you agree to pay Scribe to write a libel about Naybour, and Scribe does it, he cannot claim to be paid. The law will not assist a man to recover the wages of iniquity. And so strict is this rule, that the printer who prints the libel, and the binder who binds it, cannot enforce their claims for payment for the work they have done.

You may take it as a never-failing rule, that contracts which have for their object or which result in fraud on another person, will never be enforced. And here let me draw attention to one fraudulent kind of contract which is frequently entered into, namely, the preference, by an insolvent, of one creditor over the others. An instance will best show you what I mean:—

Mr. Micawber is a man of trade and commerce who, from evil fortune, perhaps, or, maybe, by bad management, finds himself unable to meet his engagements. In these circumstances he can only do one of two things, namely—go into the Bankruptcy Court and be "whitewashed," or else try to compound with his creditors by a private arrangement. Being a sensitive sort of man, unwilling to face the publicity and, as he thinks, the disgrace of bankruptcy, he writes to all his creditors, laying before them the state of his affairs, and asking them to accept a composition of ten shillings in the pound. The largest creditors happen to be Grasper, Grabbem & Co.; and these gentlemen, knowing that if they do not sign the deed of agreement the other creditors will not (because it will be of no use),



go to poor Micawber, and say, "We shall be glad to help you, but we don't altogether enjoy taking half of our debt instead of the whole. But, see! If you'll give us an extra ten pounds over and above the ten shillings in the pound, we'll sign the deed of arrangement."

Micawber yields to the pressure, and promises to pay the extra ten pounds, and Grasper, Grabbem & Co.'s signature appears as consenting to the deed of composition. Now, this arrangement to give the extra ten pounds is a fraud. I know it is frequently done, and I daresay men who have acted in this way will ask how it can be a fraud for them to recover as much of a just debt as they can get. I will tell you why it is a fraud. It is a fraud because one creditor agrees to take ten shillings in the pound on the understanding that every other creditor is willing to accept the same proportion; and if the debtor secretly agrees to pay more to one or two particular creditors, he and they are conspiring to mislead the rest. Let me say at once that the agreement to pay the extra ten pounds to Grasper, Grabbem & Co. cannot be enforced. It has no legal value, any more than if Micawber had said, "I will pay you ten pounds to help me swindle my creditors, or to help me to rob a till."

Further than this, if Micawber has paid the extra ten pounds down, he can afterwards sue for and recover it, on the ground that it was extorted from him by undue pressure. You see, when Grasper and Grabbem demand ten pounds as the price of their consent, the poor debtor is hardly in a position to refuse to pay it, because he knows that if this one firm stands out, the whole scheme for a composition will fall to the ground. The other creditors will never consent to take ten shillings if the largest creditor, or any considerable creditor, refuses to accept the same proportion. The reason is, that after they have all received their compositions and given receipts in full discharge, the one cantankerous firm might petition to have Micawber declared bankrupt, and so frustrate the object of the whole scheme.

(c) **Contracts against public policy or the common weal are also illegal and worthless.**—By such contracts I mean those which are likely to prejudice the wellbeing of the State—not prohibited by any Statute, but declared to be inimical to the interests of the country by the old Common Law of the land. Now, it is easy to see how these contracts may prejudice the State. They may

- (1) *Affect the country in its relations with foreign Powers; or*
- (2) *Affect the good government of the country; or*
- (3) *Be prejudicial to the country by unduly interfering with the liberty of the contracting parties themselves.*

Let me deal with these three classes of agreements in order. Contracts liable prejudicially to affect Great Britain in her relations with foreign Powers are comparatively rare in times of peace; but it may be taken as law that an agreement calculated to disturb her harmonious relations with a friendly Power is illegal. Suppose certain Hungarians were to resolve to set up a kingdom entirely independent of Austria, and some of them were to come to England and enter into a contract with a firm in Birmingham for the manufacture of a quantity of coins, intended to be the first instalment of the money of the new kingdom so soon as it could be established. This is clearly an act unfriendly to



*[Photo: Cassell & Co., Ltd.]*

**TRIAL IN CENTRAL CRIMINAL COURT, OLD BAILEY, LONDON.**





the Empire of Austria-Hungary. If this money is imported into Hungary it may lead to very disastrous complications, and in fact, by International Law, the Austrian Government would be entitled to demand redress from the Queen for allowing the coins to be manufactured in England. In my opinion the Birmingham firm could not be compelled to carry out the contract, because it would be one eminently calculated to involve Great Britain with a friendly Power.

In the early part of this century, when Napoleon Bonaparte was Emperor of the French, during the short period when Britain happened to be at peace with her Gallic neighbour, two men entered into a contract of wager upon the life of the "Corsican usurper." At that time, I may remark, wagers were contracts enforceable at law, because the Act rendering them void had not been passed. The terms of the wager were these :—"If Napoleon Bonaparte lives two years, A will pay to B £1,000 ; but if Napoleon Bonaparte dies within two years, B will pay to A £1,000." In other words, A bet B an even thousand that Napoleon would die before two years had elapsed, and B accepted the bet. Eventually some dispute arose between A and B as to the terms of this strange wager, and the matter came before a Court of Law. But the Court refused to have anything to do with it. "The contract," said the judges, "is contrary to public policy, for it immediately becomes to the interest of A that the French sovereign shall die within the specified time. It therefore becomes to his interest to encourage any plot or intrigue by which the Emperor's life will be endangered. The hatching of such plots, or the encouragement of such intrigues within British territory, would be extremely likely to give mortal offence to Napoleon, who is a friendly sovereign, and might cause him to declare war against this country. On these grounds we find the contract to be illegal." Nowadays, as I have shown elsewhere (p. 292), the wager would be illegal just because it is a wager ; but the case is still instructive, because the principle is there distinctly laid down that it is illegal to enter into contracts which may embroil Great Britain in a war.

**Trading with a foreign foe** is also illegal, as being against the common weal. By foreign foe, I mean any person who is the subject of a foreign State against which the British Government has declared war. If Great Britain declared war against China, every Chinese subject, and every person resident in the Celestial Empire, would be a foreign foe, or, as lawyers generally put it, an alien enemy.

The reason of the prohibition is obvious when one reflects that the object of war is so to cripple the enemy as to bring her to agree to your own terms of peace, or to compel her to grant redress of your grievances. One of the most effective of the means of bringing an enemy to her knees is the cutting off of her trade and commerce, and to accomplish this end you endeavour to capture and destroy her ships and the merchandise of her subjects. It would obviously be foolish, in the circumstances, to permit your own subjects to trade with her, because it would prevent her from being crippled in her resources so soon as would otherwise be the case, and thus the war would be prolonged.

Not only must a British subject not trade with a foreign foe, but he must not enter into any contract to facilitate anyone else trading with her. Thus, if Great Britain went to war with France, it would be illegal for a British subject to insure



American goods consigned from New York to Paris, because this is facilitating trade between America and France.

What happens, were Great Britain to go to war with another country, with regard to *debts already due, and contracts already made* with people of that country? The answer is simple—they are *all suspended* until the war is over. Suppose Great Britain were to-morrow precipitated into a war with Germany. As everybody knows, Great Britain carries on an extensive trade with that country, and the result would be that no Briton living in British territory would be allowed to pay his debts to his German correspondents, nor to sue them for money owing by them to him, nor to make any contract during the continuance of the war, nor in that time to proceed with any contract already entered into.

Thus, take the case of a merchant in London who owes money to a German merchant in Hamburg; money is due to him by another German in Berlin, and he has contracted to deliver merchandise to a trader in Leipzig. The declaration of war would have this effect: the Londoner would not be allowed to pay the merchant at Hamburg, nor to collect his debt from his debtor in Berlin, nor to deliver the goods to the trader of Leipzig. If he were to manage to pay the debt due to the man at Hamburg, after the war was over he would have to pay it again, because an illegal payment being no payment at all, in the eye of the law he would not have paid the debt.

But as soon as peace is proclaimed, all the contracts revive. The British merchant could sue for the debt due to him, be sued for the money owing by him, and complete the delivery of goods ordered before the war broke out.

The foregoing paragraphs will perhaps make plain to those of a Jingo turn of mind some of the things which make it necessary for monarchs and ministers to think not once but twenty times before plunging their countries into war. It is not merely the blood spilt and the treasure spent in munitions of war that has to be considered, but the total suspension of trade and legal relations between the individuals of the contending nations; and in these days, when foreign trade and commerce form the means of livelihood of so many thousands, it is evident why the mere suspension of contractual relations, without even one blow being struck, means widespread ruin. It is because of the law that I have tried to explain that the mere rumour of a war with any considerable State does enormous damage to trade. A merchant will not accept an order from Germany if he thinks it likely that war may break out between the Queen of Great Britain and the Kaiser any day, for it would mean waiting for his money for an indefinite period; and so we invariably find peace and prosperity going hand in hand.

The next class of contracts inimical to the common weal are those **prejudicial to the good government of the country**. Let us see what these are. They include all **corrupt bargains** for the sale of public appointments, or titles, or honours, or votes in Parliament, or by electors to vote for a particular candidate, and, in fact, every kind of corrupt bargain in public life. Suppose, for instance, that a Member of Parliament were to be promised a sum of money if he would support such-and-such a Bill, and he did support the Bill; nevertheless, he would have no legal claim to the wages of his dishonour. Again, suppose an influential man said to Tom Jones, "If I use my influence to have you made a baronet, what

will you give me?" and Tom Jones replied, "On the day I become Sir Tom Jones through your influence I will give you a hundred pounds," and Tom Jones does become Sir Tom through the influence of the influential person—nevertheless, the influential person cannot bring any action for the £100.

In the interest of the public service, and to secure the good government of the country by keeping Government officials above want, *it is illegal for a Government servant to assign or charge his salary*. Let me explain this by telling you of a case that came under my notice a little while ago. Mr. Blank was a clerk in a Government office, at a salary of £300 a year, payable monthly. Being in want of money, he obtained a loan of £20 from a money-lender, upon condition that he should sign a document authorising that gentleman to receive the next month's salary. The money-lender duly repaired to the pay-office the day before pay-day, and gave notice to an official there that the salary of Mr. Blank was to be paid to him (the money-lender), and to prove his claim produced the document signed by Blank. But the Treasury official refused to take any notice of it, and rightly, because a Government servant cannot by law charge (*i.e.* mortgage) or assign his salary in advance.

I have heard of more than one tradesman and money-lender who has been induced to trust a member of the Civil Service, upon condition of having his debt secured on the next instalment of salary. As I have shown, such security is not worth the paper it is written on. The same applies not only to the salaries of Civil Servants, but to the pay of officers in the Army and Navy, including half-pay officers.

But *pensions given entirely for past services* can be assigned or charged in the way described, the difference being that in this case the country requires no further services from the pensioner in return; while in the case of the present servant the pay is given with a view to the servant keeping himself fit for the post he occupies in the Government of the country. Therefore, in dealing with Customs and Excise officers, officers in either of the Services, as well as with Civil Servants of the Crown, tradesmen and others should beware of taking any assignment of future pay.

But the most important, because the most frequent, class of these cases are **those relating to the administration of justice**. I suppose I need hardly refer to such things as promises made to bribe judges or jurors. No one, I suppose, need be told that such promises cannot be enforced; and the same applies to a promise to give a bribe to a witness to tell lies or to suppress the truth. But there is one class of contract frequently—or, at all events, sometimes—made, which is in the nature of a *promise to bribe a witness to speak the truth*.

Let me explain what I mean. Mr. Atte was bringing an action against Mr. Batte, relative to a contract made between Atte and Batte. Now, the only person whose evidence was worth anything in the case was Catte, for he was the only person present when the bargain was made. To him went Atte, saying, "Batte refuses to carry out his contract with me—the one we made when you were there—and I shall want you to give evidence for me when the case comes on." Now, Catte, I regret to say, was not a very obliging sort of man, and he at once began to think of how he could turn his testimony to account. So he declared that he



should not give evidence at all—didn't want to be mixed up in it, and so on. At last he said, "I'll tell you what I will do. If you will make it worth my while, I'll come and tell all I know. If not, I shall hold my tongue." And, after some bargaining, Atte agreed to hand over to Catte certain shares if Catte came to give evidence in the case, and a document was drawn up:—"I, Alfred Atte, agree to transfer ten shares in the Fo-fum Mine to Charles Catte, in consideration of the said Charles Catte coming to give evidence at the trial of the action *Atte v. Batte*." Both contracting parties signed it.

When the trial of the action came on, Mr. Catte appeared and gave evidence, with the result that Mr. Atte established his case, and Mr. Batte had to pay a considerable sum in damages and costs. Then Mr. Catte claimed his shares, in accordance with the agreement quoted above, but Atte refused to hand them over. He said, "I will pay you proper witness's expenses, such as you are by law entitled to, but I will not transfer the ten shares. You made me enter into that agreement quite against my will, by threatening not to come and give evidence; but now you have given evidence, and I do not want your assistance any more, I shall certainly not give you the shares unless I am obliged to by a court of law." Now what is the position here? In one word, Catte had no right to recover the shares, because he was bound, as a good citizen, to come to the Court and give truthful evidence if he was subpoenaed (or summoned) to do so; and it would be so detrimental to the interests of justice to allow a witness to put a price on himself in this way, that the law will not allow it to be done.

Do not let me mislead you. If you want an expert to come and give evidence on your behalf as to a matter of opinion, you must pay him the fee he demands, because that is employing him in a matter requiring his professional skill. As, for instance, if you wanted the late Sir Andrew Clark to come and give his opinion on a medical point, you would have had to pay him the hundred guineas which he would have demanded. But if that eminent doctor had been an eye-witness of a cab accident, and you wanted him to state merely what he saw, you could not have been compelled to pay him more than the usual remuneration, amounting to about two guineas a day and his travelling expenses. The reason is, that in the first case you wanted his opinion as a doctor; and in the second you only wanted his account of what he saw, which account he can give without reference to his profession capacity and *status*. It is, then, because of the disastrous consequences that would ensue from allowing a witness to put his own price on his evidence, that a *contract to remunerate a witness beyond the usual fee is void, and cannot be enforced*.

**ChamPERTY, or Sharing the Spoils.**—I have heard of this kind of thing being done: A has a right of action against B on account of some wrong done by B to A, or because B is in possession of property which, according to A's account, really belongs to A. But the latter, though he has a good right against B, has not the necessary funds to carry on an action. Actions at law are sometimes very expensive, not necessarily because of the lawyer's bill in itself, but because of the expenses of making a number of inquiries, and of bringing witnesses from various parts of the country. Therefore, A is unable to carry on the action against B, and so he goes to C and says, "I

have a right of action against B, but I cannot go on because I have no money. Will you find some cash to be going on with, and I will give you half of whatever I get out of the suit?" I very strongly advise C not to do it, for the simple reason that such a contract would not be binding at all. It is called in English law "Champerty," from the Latin *campum partire* = to divide the field, because it is an agreement to divide the property recovered between the actual litigant and the man who finances him.

The reason why you are not allowed to make a bargain of this sort is because of the bad effects that would be produced if such contracts were allowed to stand. For one thing, the policy of the law discourages lawsuits, and for another, it is held to be bad that anyone should take up an action as a speculation. If A has a cause of action against B, well and good. If he can manage to put the machinery of the law in motion, well and good. A and B are then fighting for their rights, or for what they conceive to be their rights. But C would be fighting, like Hal o' the Wynd, for his own hand. The rights of the case would not matter to him one straw: all he would be concerned about would be that he should get a good return for his money, and if he were an unscrupulous man he might, and probably would, try to procure a verdict for his partner by foul means as well as fair.

If C agrees to lend money to A in order that the latter may bring an action against B upon condition of receiving a share of the spoils, not only is the contract illegal and unenforceable, but it is an offence against B, who can, when he discovers it, bring an action against C for damages. I want to point out the results of a transaction such as I have described, because I have known many a man who has been offered a share of property if he would advance the money necessary to bring an action to recover it. Let no reader of mine be tempted to try to make money by such means. For no matter how just may be the claim you are asked to support, you may not support it on these terms, and the promise to give you a share of the property recovered is not worth the paper it is written on, or the breath expended in making it.

Very much akin to Champerty is another contract, called **Maintenance**, which is also held to be contrary to public policy, and so illegal. Maintenance is, as its name implies, the maintaining of the quarrel (*i.e.* lawsuit) of another by lending him money for the purpose of bringing or defending an action. Now, I do not mean to say that you can never give another man pecuniary assistance by helping him to pay his law costs and expenses. What I mean is, that you must not poke your nose into other people's actions gratuitously. Let us see how far you can go.

In the first place, you may always help *a relation*, either by blood or marriage. In the second place, you may put your hand in your pocket to find money to help the cause of one of your *servants or workpeople*.

Then, again, it is quite right and proper to assist when you and the person whom you assist have a *common interest in the action*. For instance, if you live in a village where there is a piece of waste land, which has been regarded as common land, and one day the lord of the manor puts a fence round it, with the intent to exclude all and sundry, and one of the villagers breaks



down the fence, with the result that the lord of the manor brings an action for trespass 'against him—you, or any other resident, will act legally in subscribing towards the expenses of the defendant, because you claim the same right as he, and if the lord succeeds against him, he will practically close that piece of land against you.

There is a fourth case—and that is, you are justified in helping, *for charity's sake*, a poor man to assert his rights. If a poor man has been hurt in a railway accident, and is refused compensation by the company, and he comes to me and asks me to help him to bring an action against them, I am doing no wrong, legally (nor morally, I think), in giving him money to assist in the prosecution of his claim.

Beyond these limits it is forbidden to go—to help a relation, or a servant, or to further a common interest, or to do an act of charity; and if you lend money to prosecute or defend an action outside these limits, not only can you not recover the money you have lent, but you have committed an offence in lending it at all. The most celebrated case on this subject was one arising out of the famous Parliamentary Oath controversy, in which Mr. Bradlaugh figured so conspicuously. Many readers will remember how the late Member for Northampton first objected to taking an oath in Parliament, and then, when he was not allowed to sit without that formality, offered to take such an oath. This was refused, for reasons not necessary to enter into here; and after the refusal, Mr. Bradlaugh walked up to the table of the House of Commons one day, produced a Testament from his pocket, administered the oath to himself and then took his seat, and voted twice. It was held that such a taking of the oath was not enough to qualify him for sitting and voting, and there is a penalty of £500 imposed by law on anyone who votes without taking the oath. This penalty may be sued for by anybody who chooses.

Those who remember this important constitutional battle, will recollect that Mr. Bradlaugh's most unswerving and most untiring opponent was the late Mr. Newdegate, one of the county members for Warwick. This honourable member conceived the idea of suing the member for Northampton for the two penalties of £500 (one for each vote); but instead of coming forward himself, the action was brought in the name of a Mr. Clarke, most if not all of the money being found by Mr. Newdegate. But Mr. Bradlaugh turned the tables by bringing an action against Mr. Newdegate for maintenance; and, what is more, he won it. You see, the whole law upon this subject rests upon the following reasons:—A lawsuit, even if you win, is an annoyance; and no man ought to have a lawsuit thrust upon him simply for the purpose of annoying and injuring him. It is a still greater annoyance to find, if you win, that your opponent has not the wherewithal to pay your expenses. Now suppose that I have a grudge against you, and I want to annoy you, and perhaps to ruin you, if it were not for the law of Maintenance, all I should have to do would be to get hold of a man of straw, and provide him with money to bring an action against you. The claim might be ever so ridiculous, and you might easily defeat it; but you would have to pay a lawyer to defend you; and your nominal opponent being a man of straw, you would not be able to extract any of your costs out of him. Thus you would be subject to worry,

annoyance and expense, and I, the cause of it, should be able to revenge myself upon you. I might even be able to ruin you altogether if my purse were much longer than yours. But as the law now stands, you can go behind the dummy who is put forward, and "go for" me, the real author of your troubles, and I shall have to repay all the money you spent in defending your other action, and anything more that the jury like to add to it.

Stirrers-up of strife were looked upon with great disfavour by early English judges; and I have read somewhere a charge given to the Judges of Assize in early times, exhorting them to punish stirrers-up of strife, and such as incited their neighbours to bring actions against one another. From which it would appear that in ancient days the maxim "Mind your own business" was enforced by the strong hand. Perhaps this stern repression of inciters to lawsuits was more necessary in those days than in these; for then a great many cases were tried by resort to arms. The plaintiff engaged a champion, as also did the defendant. On a day fixed for the purpose, these champions, fully armed according to their rank, fought in the lists before the judge. The combat began at sunrise; and if the defendant's man could keep it going until sunset, judgment went for the defendant. If, on the other hand, the fight resulted in a victory for one champion or the other, his principal gained the verdict. So that the stirrer-up of legal strife might easily cause loss of life or limb.

Agreements to compound or compromise public offences are illegal, because they "stifle public justice," and are therefore against public policy. Suppose, for instance, A B has forged your name to a cheque for £10, and you, on discovering the fact, threaten to prosecute for forgery. But the father of A B, anxious to save his name from public disgrace, offers that if you will adopt the forged signature as your own, and refrain from the prosecution, he will pay you the £10 back. You promise, and the father of the criminal enters into a bond for the repayment of the money. That bond is not worth the paper it is written on, and the promise cannot be enforced on either side.

You must not pervert the cause of justice by compromising crimes. A crime is an offence, not only against the person injured—*i.e.* the man whose purse is stolen, whose name is forged, whose body is injured—but it is an offence against the State; and although a private individual can compound or forgive an injury done to himself alone, he cannot release the offender from the consequences of the injury to the public body. As they used to say in the old days, "He has broken the King's Peace," and so offended the sovereign. It is because the sovereign represents the State that prosecutions for crime are always conducted in the name of her Majesty. When Bill Sikes is caught in Mr. Brown's pantry by Police-constable X 247, and is prosecuted at the Central Criminal Court for burglary, he is charged with breaking and entering the house of Mr. Brown with intent to commit a felony therein, but this is not charged as an offence against Brown—the indictment, or accusation, goes on to say, "against the peace of our Sovereign Lady the Queen." And so the name of the case is not Brown *versus* Sikes, but *The Queen versus* Sikes.

The rule is, then, that you cannot make a contract the effect of which is to prevent a man from being prosecuted for a crime. If you do, the contract is worth



nothing. There are, however, two exceptions to the rule—namely, assault and libel. If Jack Bounce has knocked you down and battered you, and you have summoned him before a magistrate for the assault, it may happen that your assailant, being penitent, will offer to make some compensation to you for the injury he has done. The magistrate may, if he likes, allow this to be done, if you are willing. But it is entirely in the discretion of the magistrate whether he will allow it or not; and he will not often permit the case to be compromised and withdrawn if the assault was an aggravated one. If, for instance, Jack Bounce stabbed you with a knife, or shot you with a revolver, no magistrate would allow the charge to be hushed up, because it would be felt that public justice required an example to be made.

The second kind of case that may be compromised by the leave of the Court is a criminal libel. It sometimes happens that at the last moment a defendant apologises for his utterances, and offers to pay the costs of the prosecution, together with some compensation to the party libelled. In such circumstances the judge will generally allow the case to be withdrawn—indeed, I have never known an instance where leave to drop the charge was not granted. It is, however, in the discretion of his lordship, who may demand that the prosecution shall proceed with the case.

In conclusion, let me warn my readers that it is a very dangerous thing to compound a felony. Thus, if one of your clerks or servants steals money from you, and you agree not to prosecute if the money is repaid, not only is that agreement unenforceable, but you yourself are guilty of a crime, for it is criminal to compound a felony.

**Sacredness of Marriage.**—The law of England regards marriage as a relationship of peculiar sanctity and also of great desirableness. It is thought good for citizens to marry, both as tending to their own individual happiness and because the State encourages the rearing of new citizens and the forming of new ties to bind a man to his country. And for these reasons **Contracts in Restraint of Marriage** are illegal and unenforceable in the Courts. An instance or two will show you what I mean by restraint of marriage; and the first is a case that happened nearly a century and a half ago.

Mr. Peers, a bachelor, and unattached, met a Mrs. Lowe, a widow—a lady sufficiently fascinating, though not in the first bloom of her youth, to capture the entire affections of Mr. Peers. A courtship ensued, followed in due course by a proposal to convert the widow into a wife once more. She, “vowing she would ne’er consent, consented” to become Mrs. Peers, and for a short time all went well. But soon a storm began to rise, for Mrs. Lowe became furiously jealous of a rival fair; nor did she hesitate to charge her lover with treachery. He denied the anything-but-soft impeachment, whereupon his lady-love suggested that to prove his sincerity he should solemnly promise not to marry anyone but herself. I have heard ere now of lovers vowing vows of this nature. Says Edwin to Angelina, “If I don’t marry you, I will not marry at all,” to which the orthodox reply is, I believe, “And if I cannot marry you, I will not marry anybody.” But the promise that Mrs. Lowe extracted from her lover was of a different kind. She took him to an attorney, and the man of law drew up

a deed in the following terms : "I do hereby promise Mrs. C. Lowe that I will not marry any person besides herself ; if I do, I agree to pay £1,000 to the said C. Lowe within three months after I shall marry anybody else."

He did marry somebody else, and refused to pay the widow the £1,000. Whereupon she promptly brought an action to recover that sum, by virtue of the promise contained in the deed. You will observe that the deed did not say, "I, Peers, promise to marry C. L., and I, C. Lowe, promise to marry Peers ; and I, Peers, hereby undertake to pay £1,000 if I break my promise." That would have been perfectly legal. But the agreement, in the form in which it was drawn, was held to be illegal, because it did not contain a mutual promise to marry. It left Mrs. Lowe quite free to refuse to marry Peers, and yet, if he married another, he would have to pay a penalty. In other words, it was a covenant to prevent Peers from marrying without the widow's leave, and, as such, was void and illegal, and Mrs. Lowe did not get the £1,000.

So, too, you cannot enforce a contract whereby you agree to bring about a marriage between two people, in consideration of your receiving a sum of money. Such contracts are called *marriage brokerage contracts*, because the person who undertakes to bring about the match is acting as a broker. A says to B, "I will introduce you to a lady of fortune, and contrive to bring about a marriage between you, on your promising to pay me a commission of £50." B consents, the introduction takes place, and in due time B marries the heiress. Then A claims the £50 commission, but he has no legal right to it. The reason is that people will not be allowed to try to induce a woman (or a man either, for that matter) to marry, when the motive of the intermediary is not the welfare of the parties, but his own pecuniary benefit.

From this it may be seen that the matrimonial agencies, which charge commission on introductions "with a view to matrimony," have no legal basis. Anyone who is fool enough to pay them money cannot get it back, but the agencies cannot enforce their claims in a court of law.

Let me say that a contract not to marry a particular person is valid. Thus, if X Y promises to give Miss Angelina £100 a year if she will not marry Edwin, and she in turn promises not to marry Edwin, and to pay X Y £500 penalty if she does—this is a valid contract ; and should Edwin's persuasions prevail over the voice of prudence, X Y can claim his £500 in an action for damages for breach of contract.

Why, it may be asked, is a contract not to marry a particular person good, while a contract not to marry anyone at all is bad? The reason lies in the total difference between the cases. As I have said, the State—and not only the British, but every other civilised State, whether ancient or modern—encourages matrimony. According to Bentham,\* this is because experience shows that the husband and father are more law-abiding, and make better citizens than the bachelor and the childless. They have given hostages to fortune and have consequently a greater incentive to industry and orderly



conduct. When we say, therefore, that it is contrary to the policy of the law to make a contract in restraint of marriage, we refer to such a contract as materially restricts the choice of a life-partner. Now, if you agree not to marry at all if you don't marry my daughter, she is not bound to marry you, and you, if you are bound by the agreement, will be unable to wed at all. But if you agree not to marry my daughter, you have still all the other eligible maids and widows in the world to pick and choose from ; and it would be highly improbable that you could not find a mate amongst them. The policy of the law would not, therefore, be interfered with by your promise not to marry my daughter, though it would be if you promised not to marry at all if you did not marry my daughter—or, not to marry anyone without my permission.

Contracts in restraint of marriage, however, are comparatively rare, and will soon become, I think, one of the curiosities of legal learning ; for women of to-day are not by any means disposed to allow themselves to be sold into marriage, either by designing relatives or anyone else. This is one good result of the higher education of women. But the last kind of contract against the policy of the law is one of the very greatest practical interest to the business man.

**Contracts in Restraint of Trade.**—It is a fundamental maxim of the law of England that everyone *ought* to be allowed the greatest possible facilities for carrying on trade and commerce or any other lawful means of earning a livelihood. So zealous is the law of this principle, that it will not allow men unduly to fetter themselves even by their own voluntary acts. Lawyers generally put it in this way—contracts in undue restraint of trade are void. Now these contracts may be classified under three great heads, namely—

1. When one man agrees with another not to carry on a certain business or exercise a certain trade or occupation.

2. Where merchants or traders agree amongst themselves to sell merchandise only at a particular scale of charges, or to carry on their trade under restrictions which are generally for the purpose of preventing competition amongst themselves or for ousting rivals. In the language of business men this is called forming a "ring."

3. Mutual agreements by masters as to the rates of wages to be paid in a particular trade, and by men as to the wages that they will accept ; the object of these combinations being, in the first place, arbitrarily to keep wages down, and in the second case, arbitrarily to raise them.

Let me deal with these three classes of contracts in the above order. The first kind is of everyday occurrence. I will show you how such contracts arise. Mr. Cake, the baker, wishes to take a branch shop, and being unable to manage it himself he employs Mr. Flower to take charge of it. As a condition of the employment, it is agreed between the parties that if Mr. Flower shall leave the service of his employer, or shall be lawfully dismissed, he (Flower) shall not set up a baker's shop or oven, nor enter into the employment of any other baker, within a radius of one mile from Mr. Cake's branch shop. The reason of the stipulation is apparent. The manager might,

and probably would, get to know his master's customers, ingratiate himself with them, and then leave and set up an opposition shop next door, in which case the said customers would in all probability go to the new shop just because they knew Flower. The very fact that the latter had it in his power to injure his master in this way might give him more power than Mr. Cake cared about; for few masters like to think that they cannot dismiss a servant, especially for good cause, without suffering severe loss.

The same kind of stipulation is sometimes inserted in indentures of apprenticeship, the apprentice covenanting that he will not, after he has served his time, set up in opposition within a certain distance. It is also a very frequent clause when a man established in business takes in a junior partner. You will often find it a term of the agreement that the new partner shall not, if the partnership is dissolved, set up in opposition in the same town or district.

There is another case, and this the most usual: Brown has a hosier's shop at 10, High Street, and wishing to give it up, he sells the stock-in-trade and business to Jones. Now, the most valuable part of the business is the connection; for, as every business man knows, it is much easier to carry on a business that has a good start than to begin one for yourself. So in nine cases out of ten, Jones will refuse to buy the business unless he (Brown) will undertake not to set up another business of the same kind within a certain distance.

I wish to explain the legal effect of agreements of this kind. They are, as you see, in restraint of trade, the man who agrees not to set up the business or carry on the trade having put himself under a restriction. Let me say at once that you ought to be very careful in making these contracts. You must not make them too strict, or you will run the risk of having them declared void; for the law permits them up to a certain point only. Where is the line drawn? I will tell you. It is drawn at the word "reasonable." It is lawful for a man to agree that he will not carry on a business or exercise a trade within reasonable limits; and it is not reasonable if the promise is more than sufficient to protect the person to whom the promise is given.

In considering what is reasonably sufficient, you have to take into account the nature of the business. For instance, in the case of the baker given above, the master has no right to claim more than will protect him from probable competition by his manager. Therefore the agreement by the manager not to set up a baker's shop must be confined to a reasonable distance from the master's shop. A mile and a half would be a reasonable distance, and even two miles would not be unreasonable. But if the manager agreed not to set up a rival shop or serve a rival baker within twenty miles, it would be distinctly not reasonable. If you ask why an adult should not be allowed to make any agreement of the kind that he pleases, I answer that the law will not allow a man to bind himself in such a way that he will probably be thrown out of work and deprived of the means of honest subsistence. Twenty miles is an unreasonable distance, because, as a rule, the customers of a baker do not lie within such an extended radius. People living within two miles might possibly come to his shop, but it is highly unlikely that anyone would



come twenty miles ; and his manager will not be allowed to agree to restrain himself without there is a good probability that by so doing the employer will be protected. The following restrictions have all been held by courts of law to be reasonable :—

By a butcher, who sold his premises and goodwill of the business, not to carry on the trade of a butcher within five miles of the old shop.

By a chemist's assistant, not to carry on business within a mile of his master's shop.

By a general merchant in a country place, who sold his business, not to carry on that kind of trade within a whole section of the county of Cornwall.

Leighton entered into partnership with Wales, to carry on the business of a coach proprietor at Croydon, for the purpose of running stage-coaches between London and Croydon at certain hours of the day. It was agreed that Leighton, who was senior partner, should have the right to dissolve the partnership at four weeks' notice, and, further, that if he did so dissolve partnership, Wales should not run a coach between London and Croydon during the hours when Leighton's coaches ran. This prohibition was to last so long as Leighton carried on the business at Croydon. The senior partner, after a time, gave the four weeks' notice to dissolve partnership ; and Wales at once made arrangements to run coaches in competition. Leighton sued for damages, and succeeded, because it was held a reasonable contract, only just sufficient to protect Leighton from competition.

Suppose the agreement had been that on dissolution of partnership Wales should not run stage-coaches between Croydon and Brighton, or between London and Hatfield, it would have been void and illegal, because coaches between Croydon and Brighton, or London and Hatfield, would not have been necessary to prevent competition with the old business.

A surgeon engaged an assistant, who agreed not to practise on his own account within ten miles of the place where the surgeon lived. This was upheld by the Court. Had it been a retail baker, in a town, it would not have been reasonable, because the customers of a town baker lie within a smaller area than the patients of a doctor.

The rule is, in fact, that the greater the radius of probable customers, the wider may be the prohibited area, as was illustrated by the case of *Harms v. Parsons*, where a man had agreed not to carry on the business of a horsehair manufacturer within 200 miles of Birmingham after the firm of which he was a member dissolved partnership. Here the Court upheld the agreement, though they would not have supported it in the case of the surgeon in the example last given.

A commercial traveller in the lace trade, who travelled all over a large district in England, seeking orders from shopkeepers, agreed that on the termination of his service he would not travel in the same trade over "any part of the same ground," and that if he did so travel he would pay £50. The traveller, by name Gething, left the employment about twelve months after his engagement, and at once began to travel for a rival lace manufacturer in the same district as before. When he was sued by his old employer for damages, he contended that

his agreement was unreasonable, because the area in which he had bound himself not to solicit orders was a very large one. But he lost, and had to pay the £50 to his old employer.

Now let us consider the sort of restriction that would be held unreasonable. In the first place, any agreement not to carry on trade at all is quite illegal—such a contract is one in general restraint of trade, and will not be allowed. And any covenant or promise not to carry on a business is void and of none effect if it is more than sufficiently wide to protect the person to whom the promise is made.

The following are cases where agreements in restraint of trade have been held unreasonable and illegal :—

Mr. Price carried on the trade of a perfumer in London, and, wishing to dispose of his business, he sold it, with the goodwill, to Mr. Green, at the same time agreeing not to carry on that trade within the cities of London and Westminster, or within 600 miles thereof. Mr. Green died, and his executors succeeded to the business, under the same rights as Green had. What was their surprise to find Price setting up for himself a rival establishment ! They brought an action for damages against him, and he pleaded that the agreement was unreasonable. The judges held that as regards the 600 miles' limit the contract could not be enforced, though it was good for London and Westminster only.

Another case was an action brought by Allsopps, the brewers, against one of their former travellers. This man—whose name was Wheatcroft—when he entered the employ of the celebrated Burton firm, had agreed that if he left their service he would not, within two years from quitting it, “directly or indirectly sell, procure orders for the sale, or recommend, or be in any wise concerned or engaged in the sale or recommendation of any Burton ale or porter brewed at Burton, or offered for sale as such, other than the ale or porter brewed by the firm of Allsopp.” This was a pretty sweeping contract, sufficient to exclude Mr. Wheatcroft from the beer and porter business altogether for a couple of years. It was, in fact, too sweeping ; and so the Messrs. Allsopp found when they tried to enforce it. For Wheatcroft, having left them, entered the service of another Burton firm of brewers, and when Allsopps asked a judge in Chancery to stop him continuing in that service, their request was refused. “Unnecessarily extensive,” was the comment made on the above-quoted clause ; and, as “unnecessarily” is equivalent to “unreasonably,” and unreasonable restriction is unlawful, the agreement was declared to be of no use at all.

It would not be proper to conclude a dissertation on the law of contracts in restraint of trade, without referring to a case recently decided. You have all heard, I daresay, of Nordenfelt guns. Well, Mr. Nordenfelt, the owner of the works where these guns and their ammunition were made, sold that part of his business to a limited company, called the Maxim-Nordenfelt Gun Company, Limited. I should say that besides guns, Mr. Nordenfelt carried on the manufacture of torpedoes and many other things ; but he only sold to the company his business so far as it related to the manufacture of guns and ammunition. He also entered into an agreement that he would not carry on business in the gun and ammunition trade for a period of twenty years after



the sale of the business, anywhere. Now, this was a very strong contract—far stronger than had been enforced in any case before, because it was without limit as to distance—and in course of time the highest tribunals in England were called upon to decide whether it could or could not be enforced, for Mr. Nordenfelt did attempt to resume the manufacture of guns and ammunition within the prohibited period of twenty years.

Finally, the House of Lords, after long discussion and consideration, decided that the agreement must be enforced. They admitted that the decision might, at first sight, seem to contradict the law as I have laid it down in the preceding paragraphs of this section; but a little consideration will show that all the cases I have mentioned are quite consistent with this, and proceed on a uniform principle. A covenant not to trade in perfumery within 600 miles of London was held too restrictive, and therefore bad. Why? Because the customers of the old business would not lie, in all human probability, within so wide an area. In other words, the agreement was more than sufficient to protect the interests of the man who bought the old perfumery business—for the establishment of a new perfumer's shop, say, at Newcastle, would not hurt the perfumer in London.

But if you look at the business of a maker of guns and other munitions of war, you will see how entirely different is the case. His customers are not people who live in this or that neighbourhood—they are the Governments of the world; and a manufacturer established in Germany—Herr Krupp, for instance—can as readily compete with Armstrong, Mitchell & Co., of Elswick, as could a rival who set up a factory next to Armstrong's on the Tyne. The maker of big guns can hardly have more than one customer in one country, and Nordenfelt guns would sell as well if made in Belgium as if made in England. Put it another way. What was the use of buying the goodwill of Nordenfelt's business if you could only restrain him from setting up again in opposition the next day at a place three or four hundred miles away? If he were to set up in Buda-Pest he would be as formidable a rival to the old business as if he set up in Birmingham. Hence, the agreement not to set up anywhere was held to be reasonable in the circumstances, and Mr. Nordenfelt was ordered to carry out his undertaking. At the same time it must be remembered that the restriction did not extend to any branches of his business except the manufacture of guns and ammunition. If he had agreed not to carry on any of his old business (including torpedo-making and the like) anywhere, I think it would have been a void agreement, because no man will be allowed to put himself in such a position that he cannot work at all.

The position may be summed up in this way: An agreement in restraint of trade is good so long as it is reasonable. It is not reasonable if it is more than sufficient to protect the person to whom the promise is made. And in considering whether the restriction is merely sufficient, or more than sufficient, you must look at the kind of trade in question, and the area over which customers are likely to be spread.

There are other contracts "in restraint of trade" besides those entered into by servants with the masters, partners with their co-partners, and vendors of businesses with the purchasers thereof. These are chiefly agreements by merchants, manufacturers, and others to keep up the price of commodities,

and agreements among workmen to keep up the price of labour; but these will be dealt with in subsequent chapters.

(d) **Immoral Contracts.**—The common law of both England and Scotland absolutely prohibits any contract *contra bonos mores*. As far as I know, the term immorality in this connection has always been confined to sexual immorality, and it has a wide application.

Where a man who had lived with a woman who was the wife of another, but living apart from her husband, and after the illicit cohabitation had ceased the man promised verbally to allow his paramour an annuity, the Court would not enforce the promise. Now let me draw a distinction. If people have been living in illicit intercourse, and after such intercourse had ceased the man promises by a deed, under seal, to give an annuity, his promise will be binding. You see, the only difference is in the way the promise is made—in the one case being by a deed, and in the other not.

But even when a promise is made by deed it will not be binding if it is the price of future illicit cohabitation. Thus, if a man asks a woman to become his mistress, promising to pay her either a lump sum or an annuity as the price of her consent, in no case can that promise be enforced at law, because it is a contract in furtherance of an immoral purpose. You see, if the agreement were enforceable at all, it must be enforceable on both sides; therefore the Court would be obliged, if they were asked to do so, to compel the woman to prostitute herself. It goes without saying that they will not do such a thing as that; and as they cannot do that, neither can they compel the man to pay.

I want you to draw the distinction between a promise to pay founded on past cohabitation and one founded on future intercourse. The latter is never valid, and the former can only be sustained when it is made by deed.

A contract to put an end to immoral relations is good enough, as has been decided. A Mr. D. cohabited with a Miss G. (I suppress names, though they are published in the Law Reports). He then entered into an agreement with her that in case he and she should separate he would pay her £30 a year so long as she should continue single and not cohabit with anyone. It was held that Miss G. could enforce the payment of her annuity. I would have you note that the effect of the agreement was to put an end to the immoral relations between these two people, because the annuity was not to be paid until those relations had ceased—that is, until they separated.

The law on this kind of contract—the kind tarred with the brush of immorality—seems somewhat technical, and I should not have discussed it at length but for the fact that such contracts are sometimes of considerable trouble to executors. They very rarely are brought to light during the lifetime of the man who made the promise, and that for obvious reasons. But when he dies, his executors may have a claim made on them by a former mistress of the deceased, and then it becomes incumbent on them to consider whether the claim has any legal basis.

Not only have we to consider contracts made avowedly for an immoral purpose, but also contracts which indirectly assist in furthering an immoral



purpose. There was a livery-stable keeper (= carriage-hirer in Scotland) who let a brougham to a woman of the town, who used it to inveigle men into her net. The livery-stable man knew the woman's character and mode of life, and that the vehicle was hired for use in the way described. In that case it was decided he could not recover the stipulated rent of the brougham.

A similar decision was come to when a landlord let a house to a woman of the same class, knowing that she intended to use it for the reception of men. He was not allowed to recover his rent. And a landlord who lets a house to such a person in ignorance of her mode of life, and afterwards finds out, must not continue the tenancy, or he will have no right of action for his rent.

### SECTION III.

#### CONTRACTS REQUIRED TO BE IN WRITING.

**Writing as evidence**—Writing always advisable: not always necessary—Friendly understandings—You may not contradict what you have written—Local customs—Usages of trade—Custom must be immemorial, reasonable, and certain—Trade usage must be general—Must not be unreasonable—Nor illegal—Express contract overrules usage—Conditional written contracts—Explaining written contracts—Mistakes in written contracts—Contracts not performable within a year—Peter in search of a wife—Documents must be connected and complete—Must state all the terms—Must be signed—Agreements in consideration of marriage—Sale of land or interest therein—What is an interest in land?—Something for executors—Guarantee—Statute-barred debts—Assignment of debts—Transfers of copyright—Representations as to credit.

EVER since time when the memory of man runneth not to the contrary, one of the subjects to engage the attention of law-makers has been that of securing evidence of contracts, so that if a contract ever came in dispute there should be something to show what the terms of the bargain were. In Saxon England it appears to have been necessary that every contract should be made in the presence of three witnesses, lawful men of the neighbourhood, who might afterwards be called upon to testify in the local Court as to the substance of the contract. This seems to have been the only practicable method, for when the art of writing was confined to the clergy it was idle to require written evidence, and it is notorious that the spoken word is easily forgotten and as easily exaggerated. The three lawful men might be trusted to give impartial accounts of the transactions they were called upon to witness, and though, of course, their recollection of the terms of the contract could not be so trustworthy as a written record, it was the best way in the circumstances.

At a very early period it became customary to embody evidence of the most important legal transactions in a written form. Take, for instance, the conveyance of land. Under the first Norman kings, if Freeman wanted to sell his freehold to Parker, this is the way he did it:—Accompanied by three or four neighbours, the buyer and seller went on the land. Freeman then pulled up a sod of earth, or broke a twig from a tree, and, putting it in the hand of Parker, said, "I liver [deliver] this to you in the name of seisin of this farm, called

Whiteacre, in the county of Middlesex, the farm being bounded on the north by the farm belonging to Smith, on the east by the wood belonging to Talbot, on the west by the River Lea, and on the south by the main road running between London and Colchester, to have and to hold this farm to you and your heirs for ever," or words of similar import. Parker seized the sod or twig, and the land was his. Then if any dispute afterwards arose about the date of the transaction, or the exact boundaries of the land sold, or whether Parker had the land for his life or for him and his heirs after him, the neighbours were called upon to give evidence.

In course of a very short time, as education increased, it became customary for Freeman and Parker to have a deed prepared, written on parchment by the nearest learned man or clerk—generally in Latin—describing the estate to be conveyed, the price paid, and so on. The parties went on the land as before, with the witnesses, and Freeman said, "I liver this sod to you in the name of seisin of the hereditaments [*i.e.* inheritance] described in this deed." The deed was not signed, for the very good and sufficient reason that the buyer and seller were not able to write, but they sealed it with their seals so as to know it again. As another precaution the parchment was cut in two—not a straight cut, but an indented (from Latin *dens*—a tooth) or jagged line—and each party took a piece. In this way forgery was prevented, because if a man produced a forged piece of parchment, it would not fit the other half of the genuine original. Hence it is that these deeds came to be called "Indentures," and although we do not adopt these rough-and-ready methods to-day, yet the name "Indenture" has survived as the denomination of a deed made by two or more parties. If one of my English readers has in his possession a deed of conveyance, or a mortgage, he will, if he refers to it, find that it begins: "This Indenture."

But although deeds came into use for conveyances of land, and occasionally for other matters, they were too expensive for everyday use, and the old lawyers spun them out to such a length that they were of no use for commercial transactions. And so for ordinary business purposes men had to trust to their memories. The practice of calling in neighbours to hear all bargains died out. It was anything but convenient. For one thing, as commerce grew and extended, it was not always easy to get three neighbours to forsake their own business to go and listen to their neighbour's. Moreover, one does not always want to publish one's affairs to other people. For these reasons, amongst others, the "three lawful men" dropped out.

After this, two evils arose, evils which continue to the present day—for although Parliament has interfered to some extent by making written evidence necessary in certain cases, yet these cases are so few in number that they only touch the fringe of the question. The majority of contracts in England, and a still greater majority in Scotland, can still be made by word of mouth, and the two evils of which I speak are inseparable from merely verbal agreements. They are—first, the liability to exaggeration or diminution, owing to the fallible nature of the human memory, and second, the liability to perversion by the unscrupulous. More than this: verbal contracts are often set up that have no existence in fact. They are supported by perjured testimony,



and innocent men are not unfrequently landed into liabilities they never undertook.

For my part I think that certain kinds of claims ought not to be entertained unless they are supported by evidence in black and white. Take, for example, actions for breach of promise of marriage. It seems to me that many of these claims are merely trumped up.

A young man with a little money sets eyes on a young woman whose appearance he likes. On making her acquaintance he discovers, or thinks he discovers, many amiable qualities, and he seeks opportunities of meeting the lady with a view of improving the acquaintance. If he be a prudent young man, he will not think of marrying the maiden fair until he knows her better, and the only way in which he can do this is by cultivating her society. He wishes to behold her in the home circle, and with that intent he makes overtures of friendship to her father or brother. After he has been to the house a time or two, the mother of his innamorata discovers the reason of his visits, and, if she likes the match, will take care to give him plenty of opportunities of enjoying dear Emily's society. But soon George learns that Emily is no wife for him. She does not improve on acquaintance, and so he desires to discontinue his visits. It goes without saying that a mother of the best feeling, or a young woman of any maidenly delicacy, would scorn to pursue a reluctant and unwilling lover. Unfortunately, all mothers do not possess right feeling, nor are all maidens maidenly. Thus it may happen that the young man in question will receive a letter from Emily's mamma asking him what he means by his conduct with regard to her daughter. If this letter does not bring him to his knees, he will find in his letter-box one morning an epistle from a solicitor, who informs the astonished youth that he (the solicitor) has been consulted by Miss Emily Farewon with regard to "the engagement subsisting between herself and you. I have to ask you," the missive continues, "whether you intend to carry out your promise, and if you do not, to furnish me with the name and address of your solicitor who will accept service of a writ on your behalf." This *billet doux* strikes consternation into the heart of its recipient. One of three courses he must adopt:—He must marry Emily, or pay, or fight. If he resolves on fighting, you all know what an extremely enjoyable time he will have when Mr. Kewsey, for the fair plaintiff, makes a humorous oration for half an hour, winding up with an appeal for heavy damages for his innocent and broken-hearted client against the base deceiver who has destroyed her happiness and blighted her prospects. We all know, I say, that happy mixture of humour and pathos, of Cupid and Mammon, which seems to appeal to British juries as strongly now as it did in the days when Dickens derided it in the celebrated case of *Bardell v. Pickwick*. In the case before us, the lady enters the witness-box, and her evidence, eked out by a plentiful display of tears, and, maybe, a fainting fit at a critical period of the cross-examination, amounts to this:—That the defendant was introduced to her on such a day; that he immediately began paying her marked attentions; that on a certain day he proposed to marry her, and she accepted him; that he used to visit the house frequently, and she always looked upon him as her future husband. Mamma then steps forward and deposes to the fact that the defendant

was her daughter's accepted lover, and was so regarded by herself, the family and friends. In point of fact, there never was any proposal to marry; but the evidence of the plaintiffs, and the undeniable facts of the frequent visits to the house, will, ninety-nine times out of a hundred, outweigh all the defendant's denials, and result in a verdict for more or less heavy damages.

It is well known to those who have practised in the courts of Common Law, though little suspected by the public, how often the action for breach of promise of marriage is used as an instrument for blackmail. The number of cases actually fought will not give any idea of the extent of the mischief, because at least twenty men pay for every one that fights. I do not say by any means that all breach of promise actions are of the character of the one I have described. I only say that the process is at present open to great abuse.

If it were the law of the land that every promise of marriage must be in writing, you would at least check this abuse. It has been objected to my view, that, as a rule, men do not make offers of marriage in a businesslike spirit; and that it would be absurd to require a woman to ask her lover to put his promise down in black and white. To this I reply that there is hardly a young girl who has not either a parent, guardian, or friend to undertake the duty of seeing that all legal formalities are properly observed. And I cannot imagine any honourable man objecting to give his promise in any way that the law might demand.

After this little digression, let me say that though I advise everybody to insist on having all the contracts written down and signed, yet the law only makes writing obligatory in a few cases. As, however, these are cases of common occurrence amongst business men, they are of great importance, and should be carefully borne in mind by everybody. Dozens, nay, scores of times, is the lawyer in active practice obliged to advise clients not to invoke the aid of the law because they are not able to produce the necessary written evidence of an important contract.

Before I proceed to the discussion of these particular instances, let me say a few words about **written contracts in general**. Good business men, who do not care to risk lawsuits, make a point of having their important agreements in writing. If you are in the habit of doing this, let me warn you to be careful to *express your meaning fully in the writing*, so that there may be no mistake as to what is really meant. The reason is this: if you put down *this* in black and white, you will not afterwards be allowed to say the real understanding was *that*. This seems obvious, when you consider how elementary a principle it is that a man shall not be allowed to blow hot and cold, to say one thing and mean another. Yet it is an everyday occurrence to find men asking a judge to believe that whereas they have apparently agreed to such a thing, and have signed a contract to that effect, they did not really mean it, nor did the other party think they meant it.

The following is an instance. A asked B to carry out some very extensive work for him. B refused, unless A would give him £250 in hand—I may say that the whole price of the work would run to thousands—and would further undertake to pay for each instalment of the work as it was completed. B agreed, and an agreement in writing was drawn up and signed. One of the clauses was: "A agrees to pay to B the sum of £250, which A shall have the right to deduct from



the price of the first work delivered by B." When the first instalment of work was delivered, A offered to pay for it, after deducting the £250 which B already had in hand, according to the agreement in writing. But B objected. He said that, although this was written in the contract, the real understanding was that the £250 should remain in his hands during the whole progress of the work ; in other words, that the money in hand should be taken into account as against the last work delivered.

Now I, who had to do with the case, have no doubt that this verbal arrangement really was come to. At the same time it did not help B in the least, for the simple reason that, at the trial, he was not allowed to give evidence of it. The reason is obvious. This particular kind of contract was one which A and B were not bound to put into writing ; but when they chose to put it in writing, neither of them could be allowed to say that he had written down something he did not mean. If you did allow it, who can say where the mischief would end ? One great judge said, "If you allow parol (*i.e.* verbal) evidence to alter the plain words of the writing, you destroy all manner of confidence." To put it another way, it will not be of any use to say that you said what you did not mean, or that you did not mean what you said.

It is of the utmost importance, therefore, when you make a contract in writing, to set down on the paper exactly what you mean to agree to. Leave nothing to surmise — nothing to "friendly understanding," because although you may be able to trust a friend with whom you make a bargain not to enforce it according to the strict letter, it may be that he dies or becomes bankrupt, in which case you will have to reckon, not with your friend, but with someone whose duty it is to exact from you the uttermost farthing. Let me reiterate that when a contract is put into writing, neither party can afterwards pretend, however truthfully, that this writing was not what he meant to say. As lawyers put it, "verbal evidence cannot be given to alter, or vary, or explain the meaning of a written contract, because the writing speaks for itself."

I want you perfectly to understand me. I do not mean that you cannot have a contract partly in writing and partly by word of mouth. Except in those cases where the law says you must have it in writing, you can have it anyhow you like, either all in black and white, or all verbal, or partly one way and partly the other. What I mean is, that what you do put upon paper must stand uncontradicted ; though there is nothing to prevent you from putting into the agreement any number of "friendly arrangements," so long as you do not contradict the written word. To give a common instance :—You frequently find people signing contracts of this sort :—"A agrees to sell to B a thousand tons of goods at £10 a ton, subject to the terms settled at our interview to-day." A delivers some of the goods, and B accepts them ; but afterwards some dispute arises, and the contract comes before a court of law. B wants to give evidence to show how it was verbally arranged that he should pay, not cash down, but in bills of exchange at three months. He will be allowed to do so, though there is nothing about it in the written contract, because this evidence does not in any way contradict what is written. But if B comes into court and swears that although £10 was inserted into the contract, the real arrangement was for £9 a ton, his evidence

will have no value, because it contradicts the writing. There is nothing inconsistent in an agreement to pay £10 in a bill at three months; but it clearly is inconsistent and contradictory to agree to pay £10—that is, £9. In fact, you cannot state such an agreement without manifest absurdity.

But although it is possible to make some terms of the same contract in writing, and others by word of mouth, it is not by any means advisable to do so. You cannot gain anything by it, and you may lose. For it is obvious that disputes cannot so easily arise when everything is put down in black and white, as when the parties have to trust to their memories for some of the details.

Another rule about written contracts and verbal explanations is that you will always be allowed in a court of law to explain the meaning of a technical expression. There was a case once where a man named Wilson had agreed with one Smith to supply him with 20,000 rabbits. Wilson did deliver 20,000; but Smith claimed 24,000. The way he made it out was this: he said that 1,000 in the rabbit trade meant 1,200—that is, that the word “thousand” had a technical meaning in this contract, and must be interpreted to mean what both parties understood it to mean. In the same way, when Miss Maddox signed a contract engaging herself to act at a theatre for “three years,” she was allowed to show that “three years” in the theatrical profession means the theatrical seasons of three years, and not three years of 365 days each. This, you see, was not to contradict the contract as written, but to show the meaning of a particular word in it.

It is a truism to say that words, as such, have no value. They are only the medium for expressing the true meaning of the people who use them; and, therefore, if you and I use a particular word in a sense in which we both understand it to have a special meaning, it is not open for one of us afterwards to pretend that he used it in its ordinary sense. Thus the word “circuit” has one meaning for a judge and quite another for a Wesleyan minister. “Brief” to the ordinary man is an adjective meaning short; to the barrister it is a noun, signifying a piece of paper containing instructions from a solicitor; and to a thief it conveys the idea of a begging letter such as impostors send round to the charitably disposed. Here you have a good instance of a word with one ordinary and two technical meanings. So, you see, 1,000 means one thing between you and me, and quite another between two rabbit-dealers; a year in an ordinary way means twelve calendar months, but to an actor and the manager of a theatre it is merely a convenient way of expressing the theatrical season of a year. Again, when I speak of “Berthas” and “Marthas,” I usually mean certain ladies; but if I told a stockbroker to buy me a hundred Berthas, he would know that I referred in a technical or slang way to a particular kind of railway stock. You can easily see how necessary it may be for judges to have explained to them the technical meanings of ordinary-looking words; and it is on the principle of getting to know what words mean—that is, what they mean to the people who used them—that you may always give verbal explanations of technical terms.

Akin to this is the rule that you can always give evidence of a **local custom or the usage of a trade**, so as to incorporate it into the contract,



so long as it does not contradict or alter what is written. The reason is this, that local customs and trade usages are invariably implied as parts of contracts, and it is not necessary for people expressly to state that the custom or the usage shall form part of the agreement. For the custom of a locality is the law of that locality, and the usage of a trade is the law of that trade. Therefore you need no more say that the custom or usage shall apply than a man or woman who marry need expressly say that they intend to assume the legal relations of husband and wife. People do occasionally incorporate the law into contracts. I was present in court one day when an agreement was read out, concluding with these words: "If either of the parties hereto shall fail to perform his part of this contract, the other shall have the right to recover damages for the breach." The presiding judge laughed consumedly. It struck him as ridiculous that these people should pretend to give each other rights which the law itself bestowed as a matter of course.

Now for an instance of a local custom which was held to form part of a written contract, though that contract itself contained no mention of the custom. Mr. Dallison let a farm in Lincolnshire to Mr. Wigglesworth for twenty-one years from March 25, 1753. In the last year of the lease the farmer sowed his fields with corn, although, of course, he knew quite well that the crop would not ripen until five or six months after the tenancy had expired. Wigglesworth duly quitted the farm in March, 1774, and in August of that year claimed the right, under local custom, to go back and reap the crop that he had sown. But the landlord objected to this. He said that the contract between the farmer and himself was contained in the lease, and that the farmer could not vary a written contract in any circumstances. The result was a lawsuit, and the Courts held for the farmer, on the ground that local custom always forms a part of every contract unless it is excluded, or is contradictory of the written agreement.

The same thing applies to the usages of particular trades. If two members of the London Stock Exchange make a bargain in relation to stocks and shares, it is not necessary for them to write down, "We make this agreement subject to the rules of the London Stock Exchange." It is implied—understood by law to be so made. And so with every trade or business where there are definite and well-understood customs. Thus it is the custom amongst members of the Stock Exchange to pay up all round on certain days every month; and, therefore, if a jobber sells stock to a broker, he will not be entitled to demand his money until settling day.

**But there are limits to the validity of customs and usages.** When I speak of custom, I mean the custom of a particular neighbourhood—such as a parish, burgh, or county. When I speak of usage, I refer to a particular trade or class of traders. Custom indicates a place; usage refers to persons. Thus you may have a usage scattered all over the world amongst a particular class of traders—tea merchants, for instance, or auctioneers, or bankers; and whenever one of these people goes to another place of business, he may carry the usage with him. But a custom must be limited to a specific geographical

area. If you go into that area, you come under the rule; if you move out of it, the rule no longer binds you.

A **valid custom** is not easy to establish. To begin with, you cannot have a new custom—that is, a new legal custom—because it must be (a) **immemorial**. Now this means that it must have been in existence so long that you cannot point to a time when it did not exist. It is, in general, enough for the people who claim the custom to bring the oldest inhabitant of the parish, etc., who swears that ever since he can remember, this custom has been observed. Then it is left to the other side to prove, if they can, that the practice had in fact a modern origin; and if they cannot, the custom is established so far as age is concerned. (b) It must be **reasonable**; on this rock many so-called customs split when the storm of a lawsuit tests their strength. The most curious case, perhaps, of custom being held reasonable—at all events, in recent times—occurred in 1875. The inhabitants of a little place called Ashford Carbonel, in Shropshire, had been in the habit of using a field in the parish, belonging to a gentleman of the name of Hall, as a kind of playground. I do not mean that they played in it always, or every day, but they claimed the right to set up a maypole, to dance, to play at kiss-in-the-ring, and generally to disport themselves on such days as they (the villagers) liked to choose. The proprietor of the field not unnaturally objected, because the villagers' revels prevented him from using his field as he wanted. The custom did no harm so long as he kept his field simply for pasturing sheep and cattle, but he could not plough it, nor leave the grass standing for hay; and so he brought an action for trespass against some parishioners who, according to ancient practice, went to enjoy themselves in Maypole Piece, as the field was called. But the judges held that the custom was reasonable. "Surely it is reasonable that they [the villagers] should have a spot in which to enjoy fresh air and healthful exercise," said one of their lordships. "The advantage to them," remarked Chief Baron Kelly, "counter-balances the disadvantage to the proprietor." And so the inhabitants of Ashford Carbonel still, I believe, enjoy the use of Maypole Piece for their Arcadian amusements. In the Book on public rights and duties (Book VI.), you will find this subject dealt with at greater length, as regards customs and local rights of this kind. Let me give an instance of a local custom applying to a particular trade.

Messrs. Cooper & Co. were warehouse-keepers in London, and one day a Mr. Heilbron asked them to warehouse for him some wool which was, he said, consigned to him, and was then on shipboard. He also asked Cooper & Co. to land the wool, and pay all freight, dock duties, and other charges on it. This they did, paying altogether about £1,000. Besides this, Heilbron owed them a debt on another account. Then Mr. Leuckhart, a German merchant, appeared upon the scene, and said, "That wool is mine. Heilbron took the bills of lading away from me without any right, and you [Cooper & Co.] must give the wool up to me, the real owner." The warehousemen were quite willing to do this, provided Mr. Leuckhart paid them the £1,000 which they had paid for freight, etc., and the money that Heilbron owed



them. But Leuckhart refused, on the ground that he never asked them to pay anything for him—if they wanted their money, they must ask Heilbron for it. This, of course was good law, so far, but Cooper & Co. had an answer. They said, "By an ancient custom of warehousemen in the City of London, we have a right to detain the wool until you have paid us everything that Heilbron owes us." The German declined to pay, and brought an action for his goods. When Cooper & Co. pleaded the "ancient and laudable custom," as they called it, the plaintiff said he did not deny the existence of the custom, but it was so unreasonable as to be illegal.

The question in dispute, then, was: Is the custom reasonable, or not? And the Court of Common Pleas said it was unreasonable, because, as a judge put it, "if a foreign merchant had consigned goods to a London agent, who warehoused them, the warehouse-keeper might detain the goods until the foreigner paid some private debt owing by the agent." "It is a custom," remarked his lordship, "which is obviously prejudicial, in a direct manner, and in a very high degree, to foreign trade. For no foreign merchant would be content to consign his goods to this country for sale if they could be made liable, whilst warehoused for safety, to satisfy a debt already due from the agent to the warehouse-keeper in respect of other goods."

There was, on the other side of the line, a Liverpool case, showing how far a custom will be held reasonable. It was a case of the sale of corn by sample—that is, the seller exhibits a sample of his goods to the buyer, such corn being already warehoused near the docks. Mr. Jameson had sold corn in this way to Mr. Sanders, but the latter gentleman did not trouble himself to inspect his purchase until three or four days afterwards. When he did so, he found the corn in the granary much inferior to the sample shown to him, and at once threw up the bargain. But Sanders objected, because, he said, Jameson ought to have gone to look at the grain the same day he bought it, and either have accepted or rejected it. Such, said Sanders, was the old custom of the Liverpool grain market. Jameson objected, in turn, that if there were such a custom, it was unreasonable, and, therefore, not of any value. But the Courts thought otherwise. The judges were of opinion that the custom was eminently reasonable, and for the benefit of trade, because it tended to take away unnecessary delay; and so Jameson, through not being quick enough to follow the custom of the keen business men of Liverpool, had to pay a first-class price for second-class corn. This shows you the importance of learning the customs of a market before you go to do business there.

Another case of custom held to be reasonable, and enforced despite the fact that it was not mentioned in the written contract, was in *Tucker v. Linger*. Tucker was a farmer, who took a lease of a farm near Reigate, in Surrey, from Mr. Linger. The lease was in writing. Now the county of Surrey is in the chalk district of England, where flintstones abound, and often when one goes to plough, the ploughshare turns them out. These stones have a certain value, being sold for the manufacture of glass.

In the lease, nothing was said about these flints, and Farmer Tucker, as is

customary in those parts, sold them and pocketed the proceeds. Let me say that in an ordinary way, a tenant-farmer has no right whatever to take away any part of the land—as these flints were—much less to sell it. The landlord in this case claimed the flints for his own ; but the farmer pleaded the custom of the country as his excuse. “Custom! nonsense!” cried the landlord ; “the contract between us two is contained in the written lease, and that does not give you any such right as you claim.” And so they went to law, the landlord objecting, first, that custom could have no effect on a written contract, and, second, that a custom for a tenant to take away pieces out of the fields was unreasonable. But Sir George Jessel, that great judge, thought otherwise. “It is good for the land,” the judge said, “that the flints should be removed, and it appears to me not unreasonable that the tenant who has to remove them as injurious to the land, should sell them for his own benefit. I think the Court should not interfere with a custom of the country except upon very strong grounds.”

(c) Besides being of immemorial age, and reasonable, a custom must be **certain**. Such a custom as this, for instance—that the outgoing tenant of a farm should look to the incoming tenant, and not to the landlord, for payments for seeds, tillages, etc., was held bad for uncertainty, because the outgoing tenant cannot be certain that there will be an incoming tenant. The farm might be left derelict, or turned into plantations or a game preserve, or the landlord might farm it himself, in all of which cases there would be no incoming tenant from whom the outgoing valuation could be demanded. The custom was therefore uncertain as regards the outgoing tenant, and unreasonable also for the incoming tenant, because it would make him liable for a sum which he had nothing to do with fixing the amount of, and could not in any way control.

(d) Every legal custom must be **compulsory**—that is to say, you cannot have a custom by which a man is allowed to do something. A custom, being a local law, must be compulsory. For instance, you cannot have a custom that the lord of the manor *may* permit the tenants of the manor to cut down timber trees for their own use. To constitute a custom, you must substitute the word “must” for “may.” And (e) the custom must be **consistent**—that is, not self-contradictory, and not inconsistent with the nature of the contract in question. You will best understand my meaning by an illustration. Suppose a tenant of copyhold land were to set up that a custom existed in the manor for all copyhold tenants to go into the woods belonging to the lord of the manor and cut as much timber as they pleased. This would be inconsistent with the ownership of the lord, because it would be folly to say that he owned the wood if his tenants could come and cut down all the trees in it whenever they chose. But it would not be an inconsistent custom for tenants to have the right to cut as much dead wood as they required for fuel (but not to sell). And it is a very common custom for tenants to have the right to cut timber from the woods of the lord, but only what is necessary to mend the doors, floors, and other woodwork of the farmhouse.

Let me say, also, that a man who wants to prove the existence of a custom must be able to prove that it exists, and always has existed, in a definite locality. For instance, you can have the custom of a county, a manor, a parish, and so on but some sort of defined geographical usage you



must have. It won't do to say that a custom exists. You must be able to show exactly *where* it exists.

From the consideration of local customs, I pass to that of **usage of trade**, or, as it is sometimes called, custom or usage of merchants. And in this connection it may be well to observe that "merchants" includes all classes of traders and people engaged in commercial pursuits. You may take it as an axiom, that people engaged in a particular trade are bound by the usages of that trade, whether expressly mentioned in the contract or not. There is this limitation, that if by the actual words of the agreement the usage is excluded, it does not apply.

Now a usage of trade is not like a custom of a place. To begin with, a usage need not be so very old. It may be quite modern and still be good, but it must be a general practice, well recognised in the business, and not merely the practice of your own firm, or of one or two firms, however good they may be. And it does not make such a practice a "usage of the trade" because you happen to have found it convenient. It amounts to this—a well-established practice of any class of traders is a usage of trade, and will be enforced by the courts of law, even though the usage may be of modern introduction, provided it be general. It may truthfully be said, in fact, that the greater part of the law relating to trade and commerce is simply composed of the usages of merchants.

But not every usage, however general and well known, is legal, for some usages of trade are so contrary to the principles of law that the courts refuse to enforce them. They may be contrary to an Act of Parliament, or to the general Common Law of the land, and in either case will be illegal. There was a case not very long ago where the question arose in reference to the usage of brokers in the tallow trade. A tallow merchant named Mollett, wrote to a tallow broker, saying, "Buy so much tallow for me." I want you to notice the terms of the order—buy "for me." This made the broker the merchant's agent to buy. Now it is a principle of the Common Law that an agent must always act as agent, and in no other capacity. Thus, if I appoint you my agent to buy tallow, you must not sell me your own tallow. If I appoint you my broker or agent to sell my tallow, you must not buy it yourself. If I ask you to *buy for* me, you must not *sell to* me, no matter whether you give me the market price or not. Why not? Because your duty as my agent is to do your best for my interests. As my agent to buy, you ought to buy as cheaply as you can—that is clear. But if you assume the rôle of seller, you will want to get as much as you can for your goods, and so your duty (of buying cheap) will conflict with your interest (of selling dear). You can, of course, tell me that you have wares of your own to dispose of; and then we may deal together; but in that case you cease to be my agent.

Now Mr. Robinson, the agent in the tallow case, had a lot of tallow of his own, so he set aside so much of it, and sent in his account to Mr. Mollett for £—, being the market price of the day. In other words, instead of buying tallow for the merchant, he sold tallow to him at exactly the same price that it would have cost to buy it elsewhere—not a farthing less or more. But Mr. Mollett refused to take the stuff, availing himself of the legal doctrine that I have explained.

Then the broker developed a flank attack. "True," he said, "on general

principles of law I ought not to have sold my own tallow to my principal, but there is a usage amongst tallow brokers by which I am justified. That usage is for brokers to buy large quantities of tallow, and when their customers send orders to buy, to set apart some of this tallow to meet the order, charging the market price of the day. It is all the same for the merchant so long as he gets his tallow and pays the same price." The judges, however, would not sanction such dealing. They acquitted this particular agent of dishonesty, but they said the usage was an unreasonable one, and could not be supported. The rule as to agents dealing with their principals had been laid down to check fraud, and any custom or usage to the contrary would open a wide door for dishonesty. So Mr. Robinson lost his case, and that usage was quashed.

Again, there is an Act of Parliament, called Leeman's Act, which makes it illegal and void to contract to sell shares in any bank in the United Kingdom unless you mention the numbers of those shares. Thus, a contract like this: "A agrees to buy and B agrees to sell three Bank of ——— shares at £190 each," is bad. It ought to be: "A agrees to buy and B agrees to sell three Bank of ——— shares, numbered 20, 21, and 22," or whatever the numbers may be. The object of this Act is to prevent speculation in these shares. There is a usage on the London Stock Exchange, however, to buy and sell the shares of banks without mentioning the numbers; and, I believe, any member of the Exchange who refused to carry out his bargain would be expelled. That, of course, is his own look-out, but it does not make the usage legal. Indeed, the judges have refused to enforce the custom, because it is in direct defiance of an Act of Parliament.

In the same way the Gaming Act (1845) declared that no betting or wagering contract should be legally binding. By the custom of Tattersall's and the usage of bookmakers and betting men, bets are considered binding, and a man who refused to pay would be immediately expelled from Tattersall's ring at the race meetings; but no amount of usage can make a bet a legal contract after a statute has declared it to be void.

Usage, like custom, must be *certain*—that is, definite—capable of being stated with definiteness and certainty. It must be so, if you come to think of it, for how can any court of law enforce an uncertain, don't-know-where-it-is usage? They would not know what it was they were compelling a man to observe, which, as Euclid would remark, is absurd. Of an uncertain character was the usage set up by a veterinary surgeon, who wanted to charge for his attendance "when there was not much medicine required." I think he would have been all right had he boldly sent in a bill for "Attendances, so much; medicine, so much"; but he did not. His claim was to charge so much for medicine when he administered a big dose to his four-footed patient, and when he only administered a little dose he charged not for the dose, but for going to administer it. When asked how he supported his claim, he said it was the universal practice for veterinary surgeons to do the like, and when further asked to define the usage, he said it was this: "To charge for attendance when not much medicine was required." The Court promptly decided that such a usage was invalid, because it was too vague and uncertain to be enforced.



Now, as I have stated on a previous page (p. 330), you cannot rely on any usage of trade if it is inconsistent with the actual contract made, because although you are supposed to contract with reference to all the usages of the particular business, yet you are quite at liberty to exclude those usages by mutual agreement. To make it plain, at the risk of repetition, let me say that you are only bound by the usages of trade when you do not say that you are not bound. Silence makes the usages applicable. For instance, it is a well-known custom amongst ship insurers that the risk on ship and cargo expires after the ship has been moored twenty-four hours in her port of destination. This means that if you have insured your ship and cargo against loss at sea—the ship being bound for the port of Hull—if either ship or cargo is lost or damaged while at sea, or within twenty-four hours of being moored at Hull, the underwriters must pay you. But when your ship has been safely moored for twenty-four hours, should a fire break out, or the vessel be run down, or by any means the ship or cargo be damaged, you cannot get any of the insurance money. So that if you effect your insurance simply, and say nothing to the contrary, you lose the benefit of the policy twenty-four hours after the good ship has been moored in port.

A somewhat singular case happened some years ago, when a ship-owner insured his ship and her cargo in the following terms: "the insurance on the ship shall continue till she is moored twenty-four hours, and on the goods till safely landed." The vessel arrived safe in port, and anchored at her moorings; but some delay took place in unloading. About forty-eight hours afterwards a fire broke out on board, and the whole cargo perished in the flames, considerable damage being done also to the ship. The cargo-owners made a claim for insurance, and the insurance brokers had the impudence to set up that by custom their risk on the cargo, as well as on the ship, expired twenty-four hours after the vessel was moored. The defence was a little bit too good in the circumstances, and the insurance people had to pay. It was deemed absurd to say that the insurance of the cargo expired in twenty-four hours when the policy expressly said "till safely landed," especially when a difference was also drawn in the policy between ship and cargo.

Another case shows that custom will not prevail against declared intention. One Yates sold some bacon to Pym, a provision merchant, "warranted prime singed." This "prime" article turned out to have a very ancient fish-like smell, and a taste anything but savoury; wherefore Mr. Pym refused to pay for it, alleging that none of his customers would look at it after they had smelt it once. Mr. Yates brought an action for the price, and when confronted with the allegation of his bacon's unwholesomeness, did not deny the soft impeachment. Instead, he produced a very convenient practice of the bacon trade, to describe certain singed bacon as "prime," even when it was tainted. Apart from the reasonableness of such a usage, the Court told Mr. Yates that it did not apply, because he had written, "*warranted prime singed.*" When he had said that he warranted it "prime," he could not say that both he and Pym took the risk of it being inferior. The word "*warranted*" upset the custom.

Again, in a case decided in 1878—*Hayton v. Irwin*—a man chartered a

ship to carry goods to Hamburg. The charter-party (*i.e.* the contract between the ship-owner and the charterer) was in these terms: "The ship shall deliver (*unload*) at Hamburg, or as near thereto as she can safely get." The ship did not deliver at Hamburg, because the captain thought he could not "safely get" right into the port; but he anchored outside, and asked the charterer to unload his goods and take them ashore in barges or lighters. This is the usual practice when a ship cannot get to the place where the goods are wanted to be. Thus, when a London charterer wants goods delivered at a wharf above Westminster Bridge, the cargo will probably be unloaded from the ship into lighters at Gravesend, or London Bridge, and so taken to the up-river wharf, because the big ship could not safely get past London Bridge. In the case of *Hayton v. Irwin*, the charterer said he was not bound to take delivery except at the port of Hamburg; and he gave as his reason that by a custom of Hamburg merchants, "delivery at Hamburg, or as near thereto as the ship can safely get," meant delivery at the port of Hamburg and there only. But the Court would not accede to this. They said, and rightly, that a custom which contradicts a written contract is of no avail. "What," they said, "is the good of saying 'or as near thereto as the ship can safely get,' if you mean something quite different?"

Here is a peculiar usage of merchants. The Gulf of Finland is adjacent to, but not part of the Baltic. Yet it is a custom of merchants in the Baltic trade to ignore this palpable geographical fact, and to count the Gulf of Finland as part of the Baltic Sea. So that when a man hires a ship to carry a cargo "to any port named by me on the Baltic Sea," he can order that ship to sail to a port in the Gulf of Finland. But if the contract was "to any port on the Baltic Sea only," the Court would consider that the word "only" was put in on purpose to exclude the Gulf of Finland.

To sum up:—Although you have a written contract, yet the customs of the locality and the usages of the trade form part of your agreement, unless the customs or usages are contradictory of the writing. In that case, the writing is stronger than the customs or usages.

Let me add another word or two about written contracts, intended to counteract a belief that many men hold. They think that once they persuade a man to put his signature to a piece of paper, they have him. This is so to a certain extent—to the extent, that is, that the signatory cannot say he did not mean what he signed, though he knew what the words of the document were. But it may happen that a man signs a thing and is not bound by what he signs.

When does this happen? Well, it happens in this wise. Mr. Asterisk is an illiterate man, able to read print but not writing, and able to write just to the extent of signing his own name. There used to be many people in that imperfect state of learning, and there are still a few. Mr. Star has agreed with Mr. Asterisk to lend the latter some money on a mortgage of his property, and has a deed prepared, not of mortgage, but of absolute sale. He represents to Asterisk that the deed is a mortgage deed, and Asterisk, believing him, signs and seals it. Then Star goes into possession of the property, and Asterisk, when he wants to repay the loan and get his estate back, is met by the objection that it was not a loan, but a sale out and out. That is so, according to the deed; but if



Asterisk is able to prove that he did not know what he was doing, and was misled by Star, the deed will be set aside.

Then there is another case, where Jacques has signed a written contract with De Smythe; but before he signed it, or at the moment of signing it, both parties agreed to a condition. Mind, one cannot sign it first and then talk about conditions. Take this instance: Mr. Pym and Mr. Campbell made an agreement in writing that Pym should sell and Campbell should buy a patent belonging to Pym, on certain terms. The contract was drawn up ready to be signed, when Campbell said, "I won't agree to sign this unless you agree to let me submit the patent to Mr. Abernethy, the engineer. If he approves, I will buy. If not, I will not." "Agreed," said Pym; and so they both signed the contract, but without putting into it anything about Abernethy's approval.

The patent was submitted to the eminent engineer, who, so far from approving, emphatically condemned the invention as worthless. Then Mr. Campbell refused to buy it. Now, Pym was one of those men who laboured under the delusion that as soon as a man sets his name to paper, he is irrevocably committed. That is all very well in its way; but you can go too far. You remember I told you (on p. 285) how, when you sell property, you sign and seal the deed and deliver it to your solicitor, telling him not to part with it except in exchange for the money. So you can always sign a written contract, upon condition that it shall be of no effect unless some event happens, or some event does not happen. In the case before us, the verbal agreement was that the written contract should not operate at all in the event of the engineer disapproving of the patent. He disapproved. Therefore there was no written contract.

You see, the verbal arrangement did not alter any term of the writing. If Campbell had said, "I sign this document agreeing to buy for £1,000, but if Abernethy does not approve, I will only give you £500," that would have been nothing, because it would have been an alteration in words of a written term. But you can always make two separate contracts, one verbal, that if such and such a thing is done you will sign a particular contract in writing; and then you can sign the written contract upon condition that if such and such a thing is not done, the contract is not to come into effect at all. *At all*, mind, not in part.

There are plenty of other instances to the same effect. In one case two farmers, Wallis and Littel, were tenants of the same landlord. Wallis thought he could do better on Littel's farm, and Littel thought Wallis's would suit him better than his own. So they agreed in writing to exchange farms; but before they signed, Littel remarked to Wallis, "Of course this is conditional on the landlord's consent," to which Wallis replied, "Certainly." On being applied to, the landlord did not consent, and so Wallis refused the exchange. Then Littel brought an action against his old friend for breach of contract, relying on the technical point that you cannot alter a written contract by a verbal arrangement. To which the Court replied, "That is quite true, but Mr. Wallis is not trying to alter anything; he is trying to show that this writing has no value at all, which is a very different thing." And the verdict was for Wallis.

Yet another instance, and again concerning a farm, this time from Wales. A farmer had applied for a farm, and the terms of the tenancy had practically been settled between him and his prospective landlord, when the farmer discovered that his new farm was overrun with hares, rabbits, and other game. The right to shoot such animals the landlord, as was usual before the Ground Game Act, reserved to himself, as a matter of course. A lease had already been drawn up by which the tenant had no right to shoot any game on the farm, and the landlord's solicitor asked him to sign. Now the farmer did not want to shoot the hares and rabbits, but he did want the hares and rabbits to be shot. What he said was this: "These animals are quite numerous enough, and quite destructive enough already. If they are allowed to increase and multiply, the farm will soon be worth nothing as a farm. You decline to allow me to kill the game. I want you to promise that you will kill it, and keep down the numbers. What is more, I decline to sign this lease at all unless you do promise." The landlord pledged his word, and the sturdy farmer duly signed the lease that had been prepared.

Far from keeping down the hares and rabbits, however, the landlord allowed them to increase at quite an alarming rate, so that, as the farmer had prophesied, the farm was eaten up by them. An action was brought against the landlord for breach of his engagement, and in defence he urged that as the contract—that is, the lease—was in writing, it was not competent for the tenant to set up that one term of it was verbal. I mean, that without denying his verbal undertaking, the landlord urged that the tenant could not enforce it, because it was not put down in writing along with the rest of the lease. But this argument availed him nothing, because the promise was not part of the lease at all. It was a separate contract, which might be legally put in this form: "In consideration of A executing a certain document, B promises to shoot the hares and rabbits on A's farm." Clearly, if A does execute the document, B has received the consideration, and must carry out his part of the contract. You see, the landlord did not promise to kill the game because of the rent to be paid to him—if so, that would have been part of the lease—but to induce the tenant to sign the lease.

To take a typical instance of what happens, one imagines, almost every day. Mr. Malpas was a cattle-dealer, who wished to send some cattle from Guildford, in Surrey, to the Islington Cattle Market. He accordingly drove his cattle to the Guildford station of the London and South-Western Railway, where he made inquiries. He was told that there would be no difficulty in sending the beasts to King's Cross (the station for the Cattle Market), but that the consignment-note could only be made out to Nine Elms Station, which was not the destination whither Mr. Malpas intended them to be sent. You know the kind of thing that railway servants, especially young ones in country places, often say: "Oh, yes; the cattle will be forwarded to King's Cross, sir; but owing to their having to change to the Great Northern line at Nine Elms, I can only make out the consignment-note to Nine Elms." In this case the cattle-dealer was induced by some such statement as this to sign a consignment-note, by which the beasts were directed to be carried to Nine



Elms. Apparently the clerk at Guildford did not do his duty, for at this intermediate place the cattle were detained, and not forwarded, as per promise, to King's Cross until Mr. Malpas had, as he put it, "kicked up a row." During the days of detention at Nine Elms no one seems to have thought it his duty to give the poor oxen a bite of food or a drop of water, and I leave you to imagine their condition when at last they found their way to Islington. The dealer brought an action against the London and South-Western Railway Company for the delay and the injury caused by not feeding and watering.

The company's view was that their liability was begun, continued, and ended under the consignment-note, but the Court held otherwise. No doubt, as I shall show you in the chapter on Carriers (Chapter II), the consignment-note is usually binding; but where one party expressly tells the other, "Sign this—it is not the whole of the contract, because, owing to circumstances over which I have no control, I cannot put the whole of the contract on that paper, but it shall be done as you wish"—how can he afterwards, without fraud, be allowed to say that the paper does contain the whole contract? If you look at it, this was precisely the position assumed by the company. They induced Malpas to sign the note for Nine Elms, saying that if he did so they would forward the cattle to King's Cross, and stated as a reason for not making out a note to King's Cross that they could not do so. Clearly, then, it would have been a fraud if they had been allowed to shelter themselves behind their own mis-statement.

There is an extremely practical moral to these cases of verbal conditions in connection with written contracts, and it is this: How much better it is, when you make a condition, or the other side makes a representation, for it to be put down in writing along with the contract! What a lot of trouble it would have saved Malpas, the cattle-dealer, for instance, had he insisted on the clerk at Guildford station writing on the consignment-note, "Beasts to be delivered to Mr. Malpas at King's Cross." Again, what a deal of worry and annoyance the tenant referred to on p. 335 would have escaped had he compelled the landlord's agent to write down and sign, "This lease was signed by the tenant on the landlord undertaking to keep down the game." And so in the case of Littel and Wallis (p. 334), how much better it would have been if they had added a footnote to their contract of exchange to this effect: "This contract is conditional on the consent of the landlord being obtained." What, again, was to prevent Mr. Campbell (p. 334) from making it a term of the written agreement that Pym's patent was to be submitted to the engineer, and if he did not approve the sale should not take place? Pym would then have been unable to dispute the arrangement; and so, in all probability, Campbell would never have had the trouble and expense of fighting a lawsuit.

There is another kind of case in which a man who has signed a written agreement may be allowed to turn round and claim that he is not bound by it, and that is where, by *mutual mistake*, something has been put in which *neither* party intended to be there. Let me show you what I mean. A had agreed to sell land to B at the price of £2,000. A rough note of the contract

was made and sent to a solicitor for him to draw up the more formal document. By a mistake of the solicitor's clerk the price was copied as £200, instead of £2,000, and the formal contract was signed by A and B in this erroneous form without the mistake being noticed. B discovered it first, but as it was to his advantage he said nothing about it until the time for transferring the land arrived. Then he offered A £200, which A, of course, refused to take as the price of an estate worth ten times as much.

Then B brought an action for breach of contract. He was under the impression that A, having signed a paper which said "A agrees to sell for £200," was bound to sell for £200. Fortunately, A was able to prove that the "£200" was a mutual mistake, and £2,000 was the price intended by both of them; and so, instead of B getting the land for £200, the Court ordered the contract to be rectified, or set right by adding the important "o." Which being done, B found himself very much on the wrong side of the hedge, for he had all his own and A's costs to pay. Serve him right! for an impudent cheat, say I. But, let me tell you, it would have been an awkward thing for A if he had not been able to prove that the mistake was on both sides. It would not have been any good for him to say, "I agreed for £2,000, and I thought £2,000 was the figure in the contract." He had also to prove that B thought the figure to be £2,000, and signed it under that impression.

Now let me tell you what you ought to do if you ever find yourself in A's position, having signed a contract in which, by some mistake, a clerk or somebody else has made a mistake, which you and the other man both overlooked. You and Highfen, the horse-dealer, agreed for you to sell and him to buy your grey gelding for £35. By some mistake you wrote £3—missing out the figure 5—and you both signed the contract, as men often do, without reading it through very carefully. As soon as ever you discover the error, write to Highfen (keeping a copy), pointing out the facts, and suggesting that he should call round and sign a corrected contract. If he refuses, and shows any signs of wanting you to let him have the nag for £3, bring an action in the County Court (Sheriff's Court in Scotland), asking for the document to be amended so as to express the true agreement between you. For agreement is mental. Written or spoken words are only the physical expression of the state of the contractors' minds.

Be very careful, when you discover a mutual mistake, to be prompt in pointing it out, and if the other party will not agree to set the matter right, bring an action at the earliest possible moment. The Court is always very loth to believe that mistakes have been made when one party affirms and the other denies the error; and although it is not difficult to prove that you made a mistake, it is not so easy to prove that the other man did, when he says he did not. And your difficulties are increased tenfold if you do not at once, as soon as you discover the blunder, take some steps to set it right. Indeed, the mere fact of keeping quiet is enough to show that, even if a mistake was made, you afterwards acquiesced in it. If not, why did you not immediately try to put the contract on its proper footing?



## CONTRACTS THAT MUST BE IN WRITING.

Hitherto I have directed my remarks on written contracts to all contracts that are put in writing. My succeeding observations will apply to certain particular kinds of contracts. For although any contract may be in writing, and is safer written than spoken, yet there are others which must be in writing, either because the Legislature has required them to be written at the time they are made, or because the Courts cannot act on them without written evidence. Let me, at the outset, remark that there is some difference here between the laws north and south of the Border, which difference I shall accentuate as I go along.

In 1677 the English Parliament passed an Act, the purpose of which can be best understood from its title, "A Statute for the Prevention of Frauds and Perjuries," which title has been abbreviated to "Statute of Frauds," and under this name it is well known to lawyers. Lord Nottingham, the Lord High Chancellor of the day, who framed the Statute, directed himself to the task of rendering business relations safer by requiring a large number of contracts of common occurrence to be proved by written evidence. We have already dealt with one kind, namely, agreements for leases of more than three years (p. 134). The rest will be dealt with in the following pages. I suppose the Statute of Frauds is the one most frequently quoted in the Courts of Common Law in England, and that is why I have given you this small account of it.

The first kind of contracts under the Statute is, **Contracts not to be performed within a year from the making** thereof. Upon such a contract you cannot, IN ENGLAND, bring any action at law unless you are able to produce evidence of the contract signed by the person against whom you are bringing the suit. Thus, if you have agreed with Blank upon a contract not to be performed within a year from the date of the agreement, and afterwards you fall out about the matter, you cannot take Blank into Court unless you have evidence of the contract signed by him. On the other hand, he cannot bring an action against you unless he has a note or memorandum of the contract signed by you.

Now let us consider (1) what is meant by a contract "**not to be performed within a year from the making thereof.**" The words "not to be performed" mean "incapable, by the very terms of the contract, of being performed." They do not refer to a contract which may or may not be carried out within the year. That is quite a different thing, as the following example will show. Two friends named Peter and Compton were talking one day about the joys and otherwise of the married state, when Compton said to Peter, "If you will give me £1 down, I will give you £10 when you marry." Peter, feeling himself challenged, agreed, and promptly handed over the sovereign; but, relying on his friend's honour, did not ask to have the promise put in writing. Thus occurred the first chapter of Peter in Search of a Wife. The next important incident took place when, some years afterwards, the gallant Peter appeared at a wedding in the *role* of bridegroom. No sooner had the honeymoon waned than the newly-wedded one, finding, no doubt, that matrimony, if joyous, was expensive, lightly turned to

thoughts of Compton and his £10. Judge of his disgust when the faithless friend blankly refused to pay the promised sum. Peter consulted his man of law, and the man of law issued a writ against Compton. Then the latter, finding there was no other loophole for escape, pleaded that this contract ought to have been in writing, because it was not to be performed within a year from the making thereof. But the bold Peter extracted the reluctant wedding-present; for although, in fact, the contract was not performed within a year, it was one which might have been performed within the statutory twelve months. There was nothing in the bargain to prevent Peter from taking his lady-love to the altar the very next day, for at the time this happened you were not required to give any preliminary notices (by banns, or such like), as you are now before you can jump into the yawning gulf of matrimony. All you had to do was to find a willing bride and a parson.

The case of *Britain v. Rossiter* is a good one, as showing the kind of contract that comes under the heading of contracts "not to be performed within a year from the making thereof." On the 10th of June, R. engaged B. as his manager, the engagement to begin from to-morrow (11th), and to be for a year. Now this was a contract not to be performed within a year from the making; for the year of employment would expire a year and a day after the contract was made. Had it been, "I engage you for a year, to begin from to-day," the case would have been quite different, because the contract would have expired just within the year. As it was, it went just over. At the end of three months R. dismissed B. without notice, whereupon B. brought an action for wrongful dismissal, but he did not win. The reason was that he had no written evidence of the contract, which was purely verbal, and as he could not legally prove the contract for a year's employment without such written evidence, he was without a remedy. Take another case. Suppose I agree to write a book for Cassell & Co., to be brought out in monthly numbers for eighteen months. I am to deliver the MS. of each number on the last day of every month, so as to be ready for the printers. It will take eighteen months for me to carry out my part of the contract; therefore, if I am wise, and Cassell & Co. are wise, we shall put the agreement in writing, and sign it. If not, Cassell & Co. could not sue me if I refused to carry out the bargain, or if I did my work badly, and I could not sue them if they refused to pay. But if the agreement were that I should deliver the manuscript and get paid when I delivered it, we need not have any writing, because I, by diligent efforts, might write the book in six months, and deliver then. And it would make no difference whether I actually did deliver within a year or not, because by the terms of the bargain I could send in my manuscript at any time. The first point is, then, that an agreement "not to be performed within a year from the making thereof," means an agreement which is agreed not to be performed within the time.

The next thing is, (2) that of such a contract as above, you must have **written evidence**. What kind of document will suffice? Well, any kind, so long as it contains the whole of the terms of the agreement. I say "it," and "document," but I might equally well say "they," and "documents," for your evidence may consist of a number of letters or papers. In fact, I have seen correspondence



extending over a period of years brought forward to prove the existence and the terms of such a contract.

The great point is that when you have more documents than one, they must be connected on the face of them, and must not require any verbal explanation to show that they all refer to the same business. What I mean is this: You, the aggrieved party, bring an action against Penanink, because he has broken a contract "not to be fulfilled within a year from the making thereof." You produce, as evidence of the contract, two letters written by your opponent. It will be all right if the second letter says "referring to my previous letter to you," or "as I said in my former letter," or something of that kind. In all probability you wrote in answer to his first letter, and his second epistle is in answer to yours. Then it will be enough if yours refers to his first one, and his second one refers to yours. Thus:

PENANINK TO JOAKS.

May 1, 1896.

DEAR SIR,—I shall be glad to undertake the post of commercial traveller for you at a salary of £200 and travelling expenses. Engagement to be for a year certain, to commence next Monday. I shall be glad to hear from you at your earliest convenience.—Yours obediently,

K. PENANINK.

To which you reply :

May 2, 1896.

DEAR SIR,—Replying to your letter of yesterday's date, I am not prepared to give £200, at all events for the first year. But I will give you £150 (payable monthly) for the first year, and increase it to £175 if the engagement is renewed. Otherwise your terms suit me.

Yours truly,

SEVERUS D. JOAKS.

The applicant then closes with your offer :

May 3, 1896.

DEAR SIR,—I have to say that I close with your terms as contained in your letter of the 2nd instant. I will be at the office on Monday for samples.—Yours obediently,

K. PENANINK.

Now about this contract there will be no difficulty, either for Penanink or yourself, should you come to a disagreement, because the letter of May 2 refers to that of May 1, and that of May 3 to that of May 2. And that is what I mean by the documents forming the contract being complete and connected on the face of them. Anyone who had those three letters could see at once that they form part of the same transaction. But suppose you omit from, say the third letter, the words "as contained in your letter of the 2nd instant." It then reads, "I have to say that I close with your terms. I will be at the office," etc. There is nothing here to show on the face of it that the "terms" are those of the letter of the 2nd. It might be that you and Penanink had had an interview in the meantime, and that the word "terms" related to something said then. "But," you may say, "I am ready to go into the witness-box and swear that the 'terms' referred to are the terms of my letter of the 2nd." You may be ready to swear it. That makes no difference. You will not be allowed to; because the law absolutely requires that the letters shall refer to one another. They must connect themselves.

There was a case some years ago in which the point cropped up in an acute form. Some publishers named Boydell proposed to bring out a number of

engravings of Shakespearian scenes in monthly parts extending over several years. They issued a printed prospectus of the work—stating the number and character of the engravings, price, and so on. A Mr. Drummond saw this prospectus—which was practically an offer of a contract (p. 349) by the publishers—and wrote his name down as a subscriber in a book which was headed “Shakespeare subscribers, their signatures.” The publishers afterwards had to bring an action against Mr. Drummond, and it became necessary for them to prove their case by written evidence. So they brought forward the signature book and the prospectus, saying that the words “Shakespeare subscribers, their signatures,” were enough to connect the signatures with the prospectus. But the Court thought otherwise. Their lordships held that there was no visible connection between the prospectus and the book, so that anyone who saw both of them would be absolutely unable to deny that they referred to one another. Had Messrs. Boydell simply pasted a copy of the prospectus in the book before inviting signatures, they would have had a good case. So much for the obvious and apparent connection of the letters or documents, if there are more than one which go to make the agreement.

(3) You must have written evidence, I have said, of the contract—I emphasise the little word “*the*.” In other words, when you want to enforce a contract “not to be performed within a year,” you must not simply have written evidence to show that a contract of some sort existed, but that this actual contract has been made. Thus, if you had a conversation with Penanink on the subject of your engaging him as your traveller for a year, to begin next week, and he promised to write to you, and he wrote: “With reference to our conversation, I am quite willing to come, but it must be at £200, not £150.” And you wrote in reply: “Very well; I agree”—that is evidence of a contract of some sort, but it will not be enough for you to bring an action against him for breach of his agreement to serve you as commercial traveller for a year at a salary of £200. His letter, you see, does not say anything about his duties. It simply says, “I am quite willing to come.” When one asks what he is willing to come as, the correspondence gives no reply. Therefore there is no written evidence of *the* contract.

It is important for business men to notice this point, which applies not only to agreements “not to be performed within a year,” but to all contracts of which the law requires written evidence. To reiterate, it is this:—When the law demands that a particular contract shall not be enforced unless there is written evidence of it, there must be written evidence of the whole of it. If it can be shown that one of the terms was left out, the case breaks down.

(4) The next thing is the **signature**. In Book II., Chap. I, p. 135, I have already dealt with this matter as far as it relates to agreements of tenancy. The law is the same with regard to the contracts now under consideration. The note or memorandum must be signed by the party to be charged—that is, by the person whom you are trying to render liable upon the contract. The signature may consist of initials, or even a printed bill-heading. You know the kind of thing I mean. A great many traders write their business notes on memorandum forms, bearing the name printed at the top, and it is not unusual for such notes to bear no signature in the ordinary sense of the word. But the judges have decided that the printed name is a sufficient signature within the meaning of the



Act of Parliament. I need hardly say, perhaps, that a name put on by an india-rubber stamp is also a sufficient guarantee. It is quite legal, also, if the note is signed by an agent, servant, or clerk, if that person is acting within the bounds of his duty. Such an agent or servant may sign either his own name or that of his principal: the effect is precisely the same.

It is not essential that a contract requiring written evidence should bear a date, because the date is not an essential part of the contract. But all the essential parts must be written in. These essential parts are, for instance, the names of the contracting parties; the consideration (pp. 276 *et seq.*); and all the terms to be observed on both sides.

(5) Finally, it is to be observed that the Statute only asks for written evidence, and therefore it is not necessary to put the contract into black and white at the same time that it is made. What I mean is, that you can make a contract "not to be performed within a year," by word of mouth, but you cannot bring a lawsuit on it without written evidence. To give an instance: Suppose in the case of *Britain v. Rossiter* (where a manager was engaged for a year "from to-morrow"), the master had written a letter two or three months afterwards, in which he set out the terms of the contract, that would have been enough for the servant to go upon. This is the way it happens:—The manager does something displeasing to the employer, who writes him a letter to this effect: "You remember when I agreed to engage you for a year from last March 25th, you told me you were competent to manage the silk department of my place. If you had not told me so, I should never have engaged you at £200 a year, which is too much to pay anyone but a competent man. You must now consider your engagement at an end, as you are quite incapable of doing the work required. (Signed) A. W." Here you have a note in writing, signed by the master, setting forth all the essential parts of the contract, and it is, therefore, sufficient written evidence to enable the discharged servant to bring his action upon. Of course, if the master can prove the man's incompetence, he will be held justified in dismissing him, but that is not the point I am now endeavouring to explain. What I want to show is, that it is not necessary, from a legal point of view, to have the written evidence before entering on the contract. You may have it at any time, so long as you get it somehow. But though not necessary, it is extremely advisable to have the contract in black and white to start with.

The second kind of contracts required to be in writing, or, rather, evidenced by writing, is **contracts in consideration of marriage**. This phrase is apt, at first sight, to be misleading, for most people at once jump to the conclusion that promises to marry are meant. It is not so, however. When Edwin offers to marry Angelina, and she accepts him, his promise to marry her is not in consideration of her marrying him, but of her promise to marry him. These are very different things. If I say to you, "If you dig my garden I will pay you ten shillings," that is one thing; but if I say, "If you promise to dig my garden I will give you ten shillings," that is entirely different. In the first case, my promise does not bind me until you have digged the garden; but in the second case, it binds me as soon as you promise to turn over the soil.

So a contract in consideration of marriage is one which is to take effect when

the marriage takes place, and not before. Obviously, then, it cannot refer to a promise of marriage. Let me show you the kind of promise it does refer to. When Edwin speaks to papa, either before or after he has spoken to papa's fair daughter, he may, perhaps, be asked what he intends to do by way of providing for Angelina when she becomes his wife. To this question a very proper reply would be, "I will settle £1,000 [or other sum] on her, and will insure my life and settle the policy on her also." A promise of this kind becomes a legal obligation so soon as Angelina becomes Mrs. Edwin. And it is this kind of promise which, being in consideration of marriage, cannot be enforced against Edwin unless there is written evidence of it, signed by him.

Just as in the case of contracts not to be performed within a year, the writing need not be a formal, "lawyery" document. It may consist of several letters or papers. These must be connected on the face of them, must contain all the terms of the contract, and must be signed. With regard to all these matters, the points (2), (3), (4), and (5), explained on pages 339 to 342, are applicable, and to those pages I refer the reader.

The third kind of agreements coming within this class is: **Agreements for the sale of land or any interest therein.** It is hardly necessary, perhaps, to say what an agreement for the sale of land is. But the meaning of "any interest therein" is not so obvious. I would first of all call your attention to the wide scope of these words; and, indeed, I cannot help thinking that if the Legislature, when it inserted them in the Act, had realised their exceeding comprehensiveness, some words of narrower significance would have been used. Of course, all that the judges could do, or ever can do in administering an Act of Parliament, was, and is, to stick to the text. It is plain, then, that whenever you find a contract with the sale of any interest in land, you must declare that it comes within the plain words of the Statute.

Now, long before this Act was passed (1679), the judges had declared that things fixed to, or growing in land were a part of the soil to which they were attached. Thus, a house built in the ordinary way is part of the land in which the foundations are sunk. Again, every fixture in that house, if it is joined to the wall, floor, or ceiling, is part of the house, and so part of the land. So also the trees and grass growing in my field are part of the field.

You see now what an extent the words "interest in land" cover. I will try to enumerate the cases to which these words apply. Every agreement for lending money upon the mortgage of land is covered. So also is every contract for the assignment of a lease. Thus, if you have a lease of Briar Villa for twenty-one years (or any other period), and you agree to make over the lease to somebody else, you must obtain written evidence of that agreement, signed by that other person; for you are selling an interest in land. Now we come to cases in which the thing sold is not so obviously a landed interest.

Farmer Wadsworth had a fine field of grass, which Crosby, a hay-dealer, desired to buy. They met one day in June, and after the usual bargaining it was agreed that Crosby should have it for twenty guineas as it stood—that is, he should have the trouble of mowing it. Before the time of mowing had arrived, some other hay-dealer offered Wadsworth a better price, which he, in gross



breach of faith, accepted. Crosby did not relish the loss of a good bargain, and proceeded to bring an action for breach of contract ; but he lost. The Court felt very sorry for Mr. Crosby, but were unable to help him, because what he had bought was an interest in land, and he had no written evidence of it as required by the Act.

Why was growing grass adjudged to be an interest in land ? It was because, as I have explained above, anything growing in the soil is part of the soil ; and by the terms of the contract, the grass was to become the immediate property of Crosby. He bought it for a lump sum as it stood.

Let me tell you how the case might have turned out differently. Suppose Crosby had said, "I will buy this field of grass at £3 a ton," and Wadsworth had agreed to this, it would not have been a sale of an interest in land. Why not ? Because the sale would not have been complete until the grass was weighed, and it could not be weighed until after it was cut. Therefore the contract would not be complete until after the grass had been severed from the soil. Until the contract was complete (that is, until the grass was weighed) it would not become the property of the buyer ; therefore he would not be buying any interest in the land:

To make this matter quite clear, let me give another instance. Nihil, a timber merchant, goes to Franklin, the owner of a plantation, and offers to buy a hundred trees in that plantation for £100. That is buying an interest in land. But if Nihil agrees to buy the trees at so much per cubic foot of timber, there is no interest in land. The reason is, that in the one case the trees are to become the property of the timber merchant as they stand ; and in the other, not until after they are measured, which implies that they should first be cut down.

I should say, in connection with this, that the fruits of the soil which grow naturally on the land, or which can be left to themselves after they are planted, and do not require an annual sowing, only come within the meaning of "interest in land." Such are, for instance, grass, the fruit of trees, the trees themselves. On the other hand, such things as corn, which is totally raised by the annual industry of the farmer, will not be regarded as an interest in land. The following agreements have been held to come within the meaning of the Act of Parliament to require writing :—

To shoot over land and take away the game killed. This is because the game is regarded as part of the estate.

To give a person a right to draw water from a well—not, of course, a mere permission to take a bucket or two occasionally, but the grant of a *right* to use the well.

To let or take furnished lodgings (p. 230).

To surrender a tenancy, and to try to get the landlord to accept So-and-so as the new tenant.

To sell shares in a mine.

The fourth kind of contract to be dealt with as requiring written evidence is **express promises by executors and administrators** of deceased persons to answer debts of the deceased out of their own pockets. The nature of such contracts can very readily be explained, though I shall reserve the question

of executors' and administrators' general liability for a subsequent Book and Chapter. It is enough here to say that if you consent to act as executor or administrator of a deceased friend or relative, you are bound to pay his debts only so far as he has left property behind him. If he leaves £1,000 worth of property and £2,000 of debts, as soon as you have paid the £1,000 to creditors you have washed your hands of the affair. The other £1,000 will be no concern of yours. But it may happen that some creditor comes to you and asks when you are going to pay him, and you, to get rid of him, say, "You need be in no alarm. I will pay you myself if need be. Call next week and you shall have the money." Now this is a promise by you to pay the creditor, not out of the deceased man's pocket, but to take the debt on your own shoulders. It cannot, therefore, be enforced, unless you give the creditor some paper, signed by you, as evidence of the promise.

What I have said on pages 339-342 as to the contract being in more than one paper, as to signature, time when the writing may be given, and so on, applies to this kind of contract also.

I may say that contracts of the above description are of the rarest occurrence, though it occasionally happens that a son, to save his dead father's good name, contracts to pay the creditors out of his own pocket. There are, however, other ways in which an executor or administrator may be made personally responsible in circumstances to be dealt with hereafter (Book V., Chapter 2). I would here remark, for fear it may have escaped the notice of my readers, that only *express* promises are dealt with in this section. As I have shown before, a promise can be made by conduct, as well as by words, and when made by conduct is called an implied promise. So that an executor who impliedly promises to pay a debt out of his own pocket may be liable, though the creditor can show no written evidence.

Fifthly, under the same Statute of Frauds, comes the class of contract called **Guarantee**, or, in the words of the Act, "a promise to answer for the debt, default, or miscarriage of another." By the Mercantile Law Amendment (Scotland) Act, 1856, this provision of the Statute of Frauds was extended to Scotland, where a guarantee is generally called "cautionry," so that now in all parts of Great Britain guarantees, cautionry, and all promises to answer for the debt, default, or miscarriage of another, ought to be proved by writing. Now there are several ways of undertaking responsibility for other people, but not all of them come in the category of guarantee, and it is only guarantees which need be in writing. It is necessary to analyse these different kinds of contracts in order to see which of them are guarantees and which are not.

Here are a few instances:—"Will you lend a horse to my friend Lightfinger?" said Darnell one day to Burkmire. "If you will, I will be responsible for seeing that he lets you have it back again." "Happy to oblige you," replied Burkmire, who accordingly let Lightfinger have the nag. But the borrower seems to have had a defective memory, for he forgot to return what was lent to him. Not unnaturally, Burkmire called on Darnell to make good the loss, and he would no doubt have recovered from that gentleman the value of the lost steed, but for the fact that there was no written evidence of the promise



to be responsible for Lightfinger's probity. This shows the nature of a guarantee. It is a contract to answer for the debt, default, or miscarriage of another, that other being himself primarily liable.

Now let me show you a contract which is not a guarantee, but which is very like one. The distinction is one highly necessary to be drawn, because if the contract is one of guarantee, you cannot enforce it without written evidence, while if it is not a guarantee, a mere verbal promise is enough.

Suppose you keep a tailor's shop, and one day Greens comes in, accompanied by Beenes. Greens is an old customer, to whom you give credit, and he brings Beenes to introduce him as a customer. If he simply says, "Mr. Taylor, this is Mr. Beenes, a friend of mine, who wants some clothes," of course, he undertakes no responsibility. But he may be ready to undertake to see that you get your money, or, as it is commonly called, to "guarantee" payment. If he says, "You may execute Mr. Beenes's orders up to £20, and if he does not pay you I will," that is a true guarantee, because Greens is under no liability unless Beenes refuses to pay or is unable to pay. In other words, Beenes is primarily liable—Greens is only responsible in the second resort. Therefore, if Beenes does not pay, you cannot sue Greens for the money unless you have written evidence of his undertaking.

But Greens may say, "You can supply my friend with clothes up to £20, and I will see you paid." In this case the promise is not a guarantee, unless it can be shown that the real meaning of Greens, as understood by you, was for you to look to him only if Beenes did not pay. The reason is that the words "I will see you paid" may mean, and generally would mean, that Greens becomes personally liable for the debt. In the case of "I will pay you if he does not," it means that Beenes is your debtor, and you only go for Greens in case you cannot extract payment from Beenes. But if it is "I will see you paid," it means that Greens undertakes to pay you, though he may have some arrangement with Beenes for the latter to recoup him. In other words, in the latter instance, Greens is primarily liable himself, and the contract is not a guarantee. Therefore you can sue on the promise without any written evidence.

The great case on the subject was an action brought by a Mr. Mountstephen against a gentleman of the name of Lakeman. Lakeman was chairman of the Board of Health for the town of Brixham, and Mountstephen was a contractor employed by the Board to make a main sewer in the town. The sewer having been made, the Board gave notice to the householders in certain streets to connect their drains with the main sewer. No notice being taken of this by the householders, the Board gave notice that if the work was not done in a certain time, they (the Board) would make the connection themselves and charge the cost to the householders; and Mountstephen was ordered to purchase the pipes necessary for constructing the connecting drains. But the Board did not order him to make the connection. The private householders did not do anything in the matter, neither did the Board. Mountstephen had waited several weeks for a resolution to be passed instructing him to lay the connecting pipes; and at last he became tired of waiting, and began

to take away his carts and working materials. While this was being done, Lakeman came up, and asked why the things were being removed before the pipes had been laid. "What objection have you," he inquired, "to making the connections?" To which Mountstephen answered, "None, if you or the Board will order the work or become responsible for the payment." Lakeman replied, "You go on and do the work, and I will see you paid."

The contractor did the work, and then asked Mr. Lakeman for the money, the Board refusing to pay. Now there was no written evidence of Lakeman's promise, and on this he relied for his defence, "because," he said, "all that I did was to guarantee that the Board would pay." If this contention was a good one, there was an end of Mountstephen's claim; for if the contract was one of guarantee, it must, under the Statute of Frauds, be proved by written evidence. The judge who tried the case held that the words were not a guarantee, because it was never intended by them for the contractor to go to the Board first. It could hardly have been so, indeed, seeing that Mountstephen and Lakeman both knew perfectly well that the Board had never ordered the work to be done, and might never do so. It was certainly a little rough on the worthy chairman that he should have to pay for public work out of his own pocket; but it was his own fault for undertaking to see Mountstephen paid.

To the same effect as the last-quoted case was the case following: J was a joiner who had contracted to complete the carpenter's work in Mr. Hatfield's house, and to find all the materials. When about half-way through the job, J found that he had undertaken a contract bigger than he could carry out—a not unusual state of things in my experience. He went to Mr. Dixon to try to get timber on credit, but Dixon refused to trust him. Then he had recourse to Hatfield, and asked him for money on account for work already done; but Hatfield refused to pay until the job was finished. Finally, the following arrangement was come to: If Dixon would supply J with the necessary timber, Hatfield would pay the price of the wood to Dixon out of any money due to J when the latter had completed the work. In other words, instead of Hatfield paying J, and J paying Dixon, Hatfield should pay Dixon. Afterwards, Dixon said that this was a guarantee; but certain judges said not. Why not? Because it was not a promise to the effect that if J did not pay Dixon, Hatfield would. It was a direct debt between Dixon and Hatfield, provided Hatfield had sufficient money of J's to pay it.

I want you carefully to note that a contract cannot be a contract of guarantee unless there is a liability on someone else first. Thus, if you guarantee a debt owing by A B to C D, it means that A B is the principal debtor. You cannot be called on first. To put it another way, C D gives credit to A B, and only relies on you as a reserve. When I say that A B is the principal debtor, and C D cannot ask you to pay first, I do not mean that C D is obliged actually to go to A B and ask him for the money—it is always the debtor's duty to take the debt to the creditor (p. 240). Still less is C D obliged to bring an action against A B before he asks you to pay. I know some people have an idea that a guarantor or surety cannot be sued



unless and until the creditor has taken action against the principal debtor and failed to get the money out of him. Rest assured that this is a mistake. In point of law, as soon as ever the debt is overdue, the creditor has the right to "go for" the surety. This leads one to ask, When is a debt overdue? As I have explained in the case of rent (p. 141), a debt is overdue the minute after midnight of the day when it ought to have been paid. So that if you guarantee a debt which is payable on the 1st of May, look out for May 2nd; because if the debtor has not paid at that time, the creditor will probably issue a writ against you the first thing in the morning.

Hitherto, in this connection, I have spoken principally of guaranteeing trade debts; but there are many other forms of the same contract. I will not stop here to treat of guaranteeing loans. That subject will be fully dealt with in Book IV., Chapter 4.

You will observe that the words of the Act applicable to this class of contract speak not only of the "debt," but also of the "default or miscarriage" (p. 345). Thus you may undertake to be responsible for a man's honesty. Everybody knows how common it is for employers to insist that such of their servants as have the handling of money shall procure somebody who will be responsible for his fidelity. In fact, insurance societies exist that make a business of issuing policies guaranteeing the integrity of persons employed in situations of trust; and so convenient are these policies, that private persons are nowadays very rarely asked to give guarantees of other people's honesty. I need hardly point out, perhaps, the advantages of these policies to employers. A case decided in 1896 gives me the cue to make a suggestion that may be useful. The master ought always to make a stipulation that the servant shall pay the premium punctually, and show the receipt within a week after paying it; for if the premium be not paid, the policy lapses. I should also mention that a Fidelity Policy, like a Fire Policy, is only a contract to indemnify against the actual loss sustained, so that it does not exceed the full amount insured. Thus, if a servant insures his honesty for £500 and embezzles £50 of his master's money or goods, the master can only claim the £50. I state this because I have heard, though I never actually met a case myself, of a master who thought he had a claim for the whole sum insured when his *employé* had misappropriated a small amount.

One of the most important things in connection with a guarantee of honesty is the fact that if the person whose fidelity is guaranteed commits one act of dishonesty the guarantee is at an end, unless the master informs the surety, and the latter consents to continue his promise. Take this case, for instance:—S entered into the service of Mr. Sanderson, where money would pass through his hands. Mr. Aston guaranteed S's fidelity in money matters. Before he had been very long in the situation the servant failed to account for some of the money collected by him for his master. Mr. Sanderson said nothing to Mr. Aston about this, but continued the man in his employment. Again S received the money for his master and did not hand it over. Then Mr. Sanderson claimed both the sums that had been embezzled. The first amount he recovered, but not the second, because he had concealed the first act of dishonesty from the guarantor.

The principle is this : If Mr. Aston had known of the first embezzlement, he would have paid what was due, and declined to continue his guarantee any longer. He ought, therefore, to have been told immediately. Moreover, Sanderson could not complain of being cheated a second time, when he continued to trust a man whom he knew to have swindled him once. At all events, he continued S in his employment entirely at his own risk.

Another case decided that a guarantee of fidelity is discharged, and becomes of no avail, if the mode of paying the servant is essentially altered. I do not mean by this simply that the wages are increased or decreased. The case referred to was one in which the London and North-Western Railway Company engaged a clerk at a salary of £100 a year to collect accounts. One Whinray promised to be responsible in case the clerk should receive money and not account for it to the Company. At a subsequent date, without the knowledge or consent of Whinray, an arrangement was made for the clerk to be paid simply by commission, without salary. Not long afterwards the collector of accounts disappeared, not forgetting to carry off a considerable amount that he had collected. The Company politely requested Mr. Whinray to make up the deficiency, but he declined. "I guaranteed the fidelity of a salaried servant," he said, "not the fidelity of a collector on commission." Then the Company issued a writ, but gained nothing by that—in fact, they added to their loss, because they had to pay Mr. Whinray's costs.

The principle at the root of this discussion is, that any essential alteration of the terms between the person employed and the employer discharges the surety from his contract, if it is likely in any way to increase the risk. That is only reasonable, for it amounts in substance to saying that when a man has undertaken one liability, he shall not have another different one foisted on him without so much as saying "By your leave." From this it will be seen that the mere alteration of the principal contract does not release the guarantor from future liability ; it is only when that alteration is either in an essential point or is likely to increase the risk.

There are other guarantees besides guarantees of debt and guarantees of fidelity. In fact, there is hardly any limit to them. Whenever one man is under a legal duty to another, a third person may come in and guarantee the performance of that duty. The essential point, which I cannot too strongly impress upon you, is that there cannot possibly be a guarantee, in the proper sense of the term, unless there is an existing obligation on the part of somebody else. Thus, if A is bound either under a contract or in any other way to perform a duty to B, C may become a guarantor to insure that A shall properly do what he ought to do. Now, if for any reason whatever A ceases to be bound to B, C also ceases to be bound. A great many mistakes are made in using the word "guarantee" in a loose manner, to express something which is really no guarantee at all. For instance, this state of things is not at all uncommon :—Brown is selling a horse to Robinson, and to induce Robinson to buy he says, "I will guarantee this horse to be sound in wind and limb." This is an absolutely fallacious use of the word, because there is no legal obligation on the part of anybody else. But the false use of the term is not always so easy to detect. Take this case, for instance :—H owed £34 to M, for which M put him in the County Court and recovered judgment. H had no



furniture upon which M could levy execution, and so the latter took out a judgment summons, and his Honour the County Court judge, being satisfied that the debtor could pay if he would, made an order that if the debt and costs were not satisfied within a certain time, H should be committed to prison for forty days. Still H did not pay, and in the end he was arrested by the County Court bailiff, whose name was Reader. A Mr. Kingham, a friend of the debtor, went to the bailiff, and said that if he would release H, he (Kingham) would pay the debt on the following Saturday. The real intention here was to give H time to raise the money himself, and, in fact, Kingham only expected to be called upon if the debtor did not pay; but, all the same, it was not a guarantee, because as soon as the bailiff had arrested H the debt was gone, it being a principle of law that you cannot arrest a man twice for the same debt. It follows, therefore, that H was not under any legal liability to pay this debt, and it was impossible in point of law for anyone to guarantee it. But the bailiff, by releasing the debtor, himself became liable to M to pay the debt, and it was decided that the promise made by Kingham was to see that Reader did not lose by letting the debtor go. Such a contract as this is called an indemnity, and, unlike a guarantee, can be made verbally. This particular promise was made verbally. Kingham said that it was a guarantee, and therefore inadmissible without written evidence, but the Court, holding that it was an indemnity and not a guarantee, accepted verbal testimony, and compelled Mr. Kingham to pay according to his agreement.

Seeing that indemnities are often confused with guarantees, let me show you what the exact difference is between them. A guarantee, as I have explained, is where you say to a man, "If you trust So-and-so and he does not perform his obligation, I will." Of course these exact words need not be used: any to the same effect will do. An indemnity, on the other hand, is when you say to a man, "I want you to do such a thing, and if you lose by it I will recoup you." This does not imply any obligation on the part of anybody else.

I have now finished explaining the Statute of Frauds so far as it relates to contracts, but there are one or two other statutes that make writing essential. The first kind is **a promise to pay a debt that has become barred** by the Statute of Limitations. Most business men, I think, know that a debt which is not paid within six years after it becomes payable, cannot be recovered in a court of law. Thus, if Detter buys goods from you on the 1st of May, 1890, at three months' credit, the debt is payable on the 1st of August, 1890. If Detter does not pay, and you do not take any action against him before August 1st, 1896, you have lost your chance, and cannot bring an action at all. It may happen, however, that Detter has paid you something on account, either of principal or interest. If so, the six years count from the date of the last payment. Thus, if Detter paid you half-a-crown on account on December 1st, 1893, you can sue him for the balance of the account any time before December 1st, 1899. There is another way in which the claim may be kept alive, and that is by Detter giving you a written and signed acknowledgment of the debt. Such a written acknowledgment keeps the claim going for another six years. Thus, if on September 1st, 1894, he writes, saying, "I'm very sorry I could not send you any money this week," or something of that kind, you can bring an action against him any time before September

1st, 1900. Understand, please, that this acknowledgment must be in writing, signed by Detter. A verbal promise is not of the slightest use to you.

It may happen that you allow six years to elapse without taking any legal proceedings, and without obtaining a payment on account, or a written acknowledgment. If so, your right to sue is dead. But it may have a resurrection, and such resurrection will take place if, even after the six years, Detter pays you something on account, or writes an acknowledgment, signed, from which a promise to pay may be inferred. By this I mean, that a letter to this effect: "I intended to let you have your money to-day, but have been disappointed myself," will be enough to cause a judge to infer that he acknowledged the debt and intended to pay. Suppose, however, that he writes, "I am much obliged to you for waiting so long for your money. I am very short just now, but will pay you if I can"—or, "I will pay you when I am in a position to do so." That is not a sufficient acknowledgment to revive your right of action. True, it acknowledges the existence of a debt, but it in no way shows a desire to be legally bound to pay. On the contrary, it means, "I should like to pay you, as a matter of honesty, but I have not enough money," or else it merely amounts to this, "I will pay you if and when I find it convenient." In other words, he will not enter into a legal obligation to pay, because it would not suit him to do so. When, however, Detter does promise in writing to pay, even after six years have elapsed, your debt revives again for another six years.

By the Sale of Goods Act, 1893, a contract for the **sale of goods of the value of £10 or more** must be evidenced in writing, unless the buyer has accepted the whole or part of the goods, or has paid something as earnest-money, or paid the whole price, or something on account. You will find this matter fully discussed in a subsequent chapter (Chap. 6).

By English law writing is also necessary in the case of **assignment of a debt**—in fact, two lots of writing are to be used here. An assignment of a debt is, when A owes money to B, and B transfers his right to C, so that A has to pay C instead of paying B. By the Judicature Act, 1873, such a transfer or assignment is valid, and A can be compelled to pay C, provided that B has transferred the debt (*a*) in writing, (*b*) unconditionally, and (*c*) that notice of the assignment has been given to A. This is how to do it. Let B write as follows:—

"March 30, 1896.

"I hereby assign to C the sum of £100 owing to me by A, in part payment of the debt of £150 owing by me to C.

(Signed) B."

Then let C drop a line to A:—

"March 30, 1896.

"To Mr. A, of 121, Great Bigge St., E.C.

"I hereby give you notice that B has this day assigned to me the sum of £100 owing by you to him.

(Signed) C."

If C does not give this notice, in the first place, he cannot bring an action against A for the debt. The reason is obvious: how can A know he has to pay C, unless he has notice that the debt has been transferred?

In the second place, the notice ought to be given as soon as possible, because.



until it is given, A has the right to consider B as his creditor. Consequently, he may offer to pay B, and if the latter takes the money, C's assignment is worthless. Or, again, A may supply B with goods, and deduct their price from the £100. For A has a perfect right to deduct from his debt to B anything that B owes him. Now if, before the notice is given, A supplies B with goods, or accepts a bill to the value of £50, that £50 comes off the debt. But if the goods are supplied or the bill is discounted after the notice of assignment, A must pay C the £100 in full, and look to B for the £50.

It should also be observed that A has against C all the defences he would have had against B at the date of the notice. Thus, if the debt was for goods supplied at the agreed price of £100, and A takes the objection that the goods were not of the quality contracted for, and that he is therefore entitled to a reduction by way of damages, he can claim the reduction against C. For C has the same rights as and no more than B had.

**Transfers of Copyright** must be in writing—not evidenced, merely; but must actually be in writing. The only exception is transfer of sculpture with copyright, which must be by a deed (p. 288). Transfer of the copyright in a book, picture, or design, must be in writing, which need not be a deed. I should like to point out, for the benefit of all whom it may concern, that it is very easy to lose the copyright of a picture altogether. A great many artists know that if they sell the copyright of one of their works, they must do so by writing, but a great many of them do not know that if they want to sell a picture and retain the copyright, they must retain that copyright in writing. The impression seems to be that if Mr. D'Aubyn Oyle sells his last work, "The Early Worm," to Mr. Paytrun, and nothing is mentioned as to the copyright, the painter keeps the copyright. This is a mistake. A document ought to be drawn up in this sort of form:—

"D'Aubyn Oyle sells to A. Paytrun the picture called 'The Early Worm,' for the sum of 100 guineas. The copyright is to remain the property of D'Aubyn Oyle.

(Signed) A. PAYTRUN,  
D'AUBYN OYLE."

Without the last clause the painter will lose the copyright. Not that it will be transferred to the buyer of the picture. On the contrary, it will be lost altogether; and anyone who pleases will be able to make and sell copies, engravings, etc., of "The Early Worm." This does not apply to the copyright of a literary work, which always remains the property of the author, unless he transfers it by writing, signed by him. Moreover, when D'Aubyn Oyle paints a picture *to the order* of Paytrun, for valuable consideration, the copyright belongs to Paytrun unless Oyle reserves it to himself in writing.

**Representations as to Credit.**—It very often happens that one is applied to on behalf of friends or business correspondents in this kind of way:—"Dear Sir, Mr. So-and-So wishes to do business with me, and has given your name as a reference. I shall be glad to know if you think that I can safely give him credit to the extent of £100." Or "Mr. So-and-So desires to take a house from me upon a repairing lease, at a rent of £60, and has referred me to you. Do you think he is in a position to warrant me in accepting him as a tenant?"

By Acts called the Mercantile Law Amendment, one of which applies to

England and the other to Scotland, no action can be brought for false representations as to a person's credit unless these representations are in writing, signed by the person making them. This, of course, is not a contract, and, strictly speaking, ought not to be included in a chapter on agreements, but I think it might with propriety be placed in proximity to the law on contracts that require writing.

When anyone makes inquiries of you as to a person's credit, you are not, of course, bound to answer : but it is impossible at all times to avoid making a reply of some kind. I strongly advise my readers, whenever applications of this kind are made to them, to stick to the word *believe*. For if you say you *know* a man to be of good credit and financial position, you are taking upon yourself a very heavy responsibility. If he turns out to be otherwise than as you have stated, you must not be surprised if you have to make good the loss sustained by the man who wrote to you. But if you say "I believe," you are safe so long as you really believe what you wrote. I need hardly say that if you, out of false notions of friendship, it may be, write that you believe So-and-So to be a person of good credit, when you are well aware that he has had cheques dishonoured and owes large sums of money, and is generally in low water, you are doing what you ought not to do, and may have to pay for your folly. A rather curious case that occurred two or three years ago shows what the limits of your liability are when you act as a reference. An actress applied to take a house in a highly respectable street in the West End of London. The landlord asked for a reference, and the name of a certain noble lord was given. The latter was written to, and asked to say what he could about the credit and responsibility of the proposed tenant. To this an answer was sent that the gentleman referred to knew the actress and had every reason to believe that she was a person of good credit, well able to undertake the responsibility of the house in question. The lease was granted, but in course of time some of the landlord's other tenants in the same block of houses made serious complaints as to the goings on of the new resident. The landlord was so ill-advised as to bring an action against the noble lord for false representations. The answer to this was : "I represented to you that the lady was a person of good credit : by that I meant pecuniary credit, which statement is perfectly true, for the lady has plenty of money and is quite able to pay her rent. I did not say a word about her character, or quietness of disposition, nor anything of that sort, and did not understand your letter to ask me to give any information on these points. People do not as a rule ask one to reveal what one knows of the morals of an intended tenant, and I did not think it any part of my business to tell you what I knew of this lady's private life." This defence was conclusive, and shows that if you want a person to whom you are referred to tell you anything more than about the monetary standing of the man or woman concerning whom you make the inquiries, you must say so.

When you make a representation (in writing) as to a person's credit or financial position, so as to enable him to obtain money, or goods, or anything else on credit, and your representation is untrue, and the man to whom you make the representation loses by trusting in your recommendation, he can bring an action against you to recoup him for the loss he has sustained. Moral :—Be careful how you give references.



## SECTION IV.

## PERSONS WHOSE ABILITY TO CONTRACT IS PECULIAR.

**Infants**—Contracts with infants altogether invalid—Sale of goods—Loans—Accounts stated—Ratification—Contracts binding on infants—For necessities—What are necessities—Scots law—Education and instruction—Contracts of service and apprenticeship—Contracts brought about by the fraud of the infant—Marriage settlements made with the Court's consent—Married women—Married Women's Property Acts—"Separate property"—"Restraint from anticipation"—What this means—Contracts with the insane—Drunken men's agreements—Corporations and companies—Bankrupts.

As a rule, you may make a valid contract with anybody, but to this rule there are some exceptions, for there are some persons who have by law only limited powers of making contracts, so as to bind themselves. These are—Infants, Married Women, the Insane, the Drunk, Corporate Bodies, including Companies, and Bankrupts. Let me take these in order.

## A. INFANTS.

There are some contracts that an infant, by the law of England, cannot make at all. In legal phraseology, these contracts are utterly void—that is, they have no effect whatever. There are other contracts made with infants which are voidable—that is, it is at the option of the infant to treat them as binding or not, whichever he pleases. In the third place, there are a few contracts by which an infant may be bound just as much as an adult.

**Void Contracts with Infants.**—By the Common Law of England, contracts with a person under twenty-one were generally not altogether invalid, but were voidable, and could be ratified when the infant attained his majority, so that it was at his option to be bound or not. The result was that many youths who had made reckless and improvident bargains during their minority were persuaded, when they came to the age of twenty-one, to promise to fulfil the obligations so foolishly incurred. A youth of nineteen or twenty would borrow heavily while at the University. The lenders were usually shady tradesmen, who bled their victims doubly; first, by charging exorbitant interest, and, second, by forcing upon the debtor quantities of goods for which he had no use, at extravagant prices. Of course, an undergraduate could, when he came of age, have repudiated all liability on these contracts, but his wily creditor almost invariably prevented such a course. The *modus operandi* was simplicity itself. An undergraduate rarely leaves his 'Varsity before he is twenty-one, and the tradesmen always took good care to ascertain the precise date at which the young gentleman came of age. As soon as possible after that date, he would wait upon him with the offer of another loan, which the unsuspecting undergraduate only too often accepted. Then the money-lender would suggest that an acknowledgment of the whole sum owing should be given, and to this suggestion also his debtor generally acceded. Another way was to write demanding payment, in answer to which demand the debtor would, as a rule, write, saying "that he was

unable to pay just then, but hoped to send something on account soon." This was enough for the wily one, because it ratified the debt, and so prevented the student from repudiating it at any future time.

I do not represent that all University tradesmen were rogues of this description, nor that undergraduates were the only infants victimised by the money-lending fraternity. Many a man in the Army could tell a tale of what used to happen, and even now happens, to subalterns young and green in judgment. In 1874 an Act was passed, called the Infants' Relief Act, for the purpose of protecting youngsters from the consequences of their own folly—a thankless task, it is true, but one deemed necessary by the Legislature. By that Act, the following contracts of infants were declared void—that is, of no effect when made, and incapable of being made valid in any way:—

(a) *Contracts for the sale of goods*, other than necessities. (As to what are necessities, see p. 357). Let me here remark that some persons have thought, and perhaps still think, that if an infant is a trader, you may safely supply him on credit with goods necessary for his business. That is a mistake. *All* contracts for the sale of goods to infants are void unless those goods are necessities, and the word "necessaries" only relates to personal, not trade requirements.

(b) *Loans*.—It is absolutely impossible for a person under twenty-one to make himself legally liable to repay a loan. More than this, even if he promises when of age to repay money lent to him when he was an infant, the contract is worthless. Even if you lend him a further sum, and in consideration thereof he promises to repay the "infantile" debt, it is still of no avail. And of late years, the Legislature has gone still further. Until 1892, if a person of full age signed a bill or a promissory note for a loan contracted during infancy, and the lender negotiated (*i.e.* sold) the bill or note to another, the latter could sue upon the bill or note, though the lender himself could not. But by the Betting and Loans to Infants Act (1892), a measure fathered by Lord Herschell, a bill or note given by a person as payment of a loan borrowed during infancy can never be used against him. Thus, if Jones, an infant, borrows £20 from Smith, and when he (Jones) comes of age, he gives Smith a promissory note for the amount, the note has no binding effect on Jones. Smith cashes the note with Robinson, who gives him £19 10s. for it, and Robinson demands the money from Jones. The latter cannot be compelled to pay, not even if Robinson is an innocent man who had no idea what the note was given for.

By the same Act, it is made a criminal offence, punishable by fine and imprisonment, to send a circular to any infant inciting him to bet, or offering to lend him money. And Lord Herschell stopped beforehand one loophole through which the loan or betting tout might have escaped, by enacting that if the circular be sent to an infant at a school, university or college, the tout should be presumed to know that he was an infant.

(c) *Accounts stated*.—An account stated is where there are accounts between the parties, and on a balance being struck, one of them admits that he owes a certain amount. This creates a debt of that amount. Thus, if Gray sends White an account like this:—



## John White in account with Thomas Gray.

Dr.				Cr.			
1894			£	1894			£
May 1st	Money lent ...	...	100	Dec. 1st	On account of interest		2
1896				1895			
May 1st	Interest at 5 per cent.	}	10	May 1st	" " " "		3
	to date				Balance due		105
			<u>£110</u>				<u>£110</u>

If White replies, "I have received your statement of account, and will remit shortly," or something to that effect, it is an admission of the correctness of White's figures and a promise to pay the £105.

Now, an "account stated" with an infant is not of the slightest use. If it were, nothing would be easier than for a man of the type I have described above to make his young victims liable for money lent and goods supplied on an account stated. The Infants' Relief Act, therefore, disallows these promises as well as the other two.

Besides making the above transactions with infants void, the same Statute aims a blow at other infants' contracts by enacting that no action shall be brought whereby to charge any person upon the **ratification** after full age of a contract made in infancy. That is to say, you can never bring an action against a man because he has ratified a contract made by him when under age. But this section of the Act has not quite such a wide application as would appear at first sight. You should know that with the exception of the contracts for goods supplied, money lent, and on account stated, all other contracts are voidable at the infant's option when he comes of age. Now, these other contracts are of two kinds. The first kind are bad unless the infant expressly ratifies them—that is to say, unless he does some act by which he shows that he intends to abide by his bargain. The second kind are good unless he expressly disavows them—that is, unless, soon after he comes of age, he does something to show that he does not intend to hold to his contract.

The effect of the "ratification" clause of the Infants' Relief Act is to make the first kind of promise quite valueless; but it does not touch the second kind; and these, therefore, remain as before—binding on the infant unless he disavows them within a reasonable time after he comes of age. What a "reasonable" time is, depends entirely on the circumstances of each particular case, and it is impossible to lay down a rule on the subject. In fact, the law in this respect is in an exceedingly unsatisfactory condition.

Young men and maidens will be interested to hear that amongst contracts which cannot be ratified in consequence of the Infants' Relief Act are promises to marry. Before that Act, if a youth under twenty-one engaged himself to be married, and after reaching adult age continued the courtship, that was a ratification, sufficient to render him liable to an action for "breach" if he proved faithless. But since a ratification is now of no avail to found an action upon, the jilted fair has no remedy, unless she can show that an entirely fresh contract was made after the coming of age. In fact, she will have to satisfy the jury

that he "asked her," as the lady novelists put it, and that she accepted him anew when he became a man.

In the second category—contracts binding unless they are disavowed after majority—the following are included :—

Infants' marriage settlements (*see also* p. 83) ;

Infants' partnership ;

Infants' contract of hire, whether the hiring be land, house, or goods, provided he have the land, house, or goods in his possession, and do not repudiate the hiring when he comes of age ;

The sale or purchase of land (including houses) by an infant ;

Leases given by or accepted by an infant ;

Contracts to take shares in a company.

There are, no doubt, a great number of other such contracts ; but the rule is, owing to the wording of the Infants' Relief Act, so obscure that I have confined myself to those that have actually been adjudicated upon.

I want you clearly to understand, that when an infant makes a voidable agreement with you, it is not you who can declare the contract off. That is his privilege, because the rule is for his benefit and protection—not yours. It is intended to give him a chance of revising, when he comes to years of discretion, the bargains he has made in the callowness of youth. It is not meant to deprive him in any way of the fruits of his skill or industry. To this rule one exception is allowed. If you have a house or land to let, and you lease it to a minor, you have the right to cancel the lease as well as he.

So much for contracts of infants that are void and voidable. Now I will direct your attention to those

**Contracts that are binding on Infants.**—It is, of course, absolutely necessary that an infant should be able to contract in some degree. Every system of law recognises this ; though, on the other hand, every system also recognises the principle that persons of less than adult age should be protected from the improvidence so natural to immaturity. The first kind of contracts recognised by English and Scots law as binding upon infants is—

(a) *Contracts for necessities.* Coke, in that celebrated work popularly known as "Coke upon Littleton," says, "An infant may bind himself for his necessary meat, drink, physick, and such other necessities, and likewise for his good teaching or instruction, whereby he may profit himself afterwards." This clearly shows that the limited power of contracting given to an infant is given to him for his own benefit—not for the benefit of his creditors. He is allowed to bind himself because it is good for him.

Now let us see what contracts are necessary for an infant. Food, clothing and lodging are obviously necessary ; therefore an infant is bound by any contracts to pay for these. You must not imagine that the food, clothing and lodging which are "necessary" simply include enough to keep the infant from want. In English, as in Scots law, "necessary" is a relative term. What is a necessary for one infant may be a luxury for another. It depends entirely on the class of society to which the infant belongs. Thus, a youth of eighteen who works in a Lancashire cotton mill at wages of twenty-five shillings per week, is well supplied in this respect if



he has a sufficiency of plain wholesome food, a fairly decent working suit, and a suit for Sundays and holidays, and a plainly-furnished bedroom. But this would be absurd for the son of a man with £5,000 a year, living in a house in Mayfair. It would be necessary for such a young man to possess an evening suit, because if he had not one he could never dine out at the houses of his friends. For the mill operative, on the other hand, a suit of swallow-tails would be a luxury—an expensive folly in most cases, simply because working-people do not expect their friends to dress in that way in the evening.

A pretty good idea of the law on this subject can be obtained from a case that occurred in the 'forties, in which case the judges pronounced their ideas of the law as it related to "necessaries" so clearly that this case (*Peters v. Fleming*) is always referred to as the "leading" or guiding case. Fleming was an infant undergraduate of Cambridge, the son of a rich man, and of a somewhat extravagant turn. A jeweller in the 'Varsity town supplied Mr. Fleming with various articles of jewellery, including a gold watch-chain, several expensive rings, scarf-pins, and other vanities with which the gilded undergrad. loveth to bedeck his person. As usual, it was not so easy to obtain payment as to give credit; wherefore Mr. Peters, the jeweller aforesaid, invoked the aid of the law. Mr. Fleming called in the aid of solicitor and counsel, by whose advice he raised the defence of infancy. This was check for the jeweller—but not quite checkmate, for he set up as a counter-plea that the articles were necessaries for the young man according to his station in life. The great Baron Parke, afterwards Lord Wensleydale, delivered the judgment of the Court upon the question in dispute, and he laid down the rule to this effect:—As to the things which are purely ornamental—that is, which cannot be put to any use by anyone—they cannot possibly be necessaries for an infant, whatever his position in life may be. Therefore the rings must go, for they come within this category. But as to articles not strictly ornamental, these might be necessaries—for instance, a watch-chain; and then it was for the jury to decide whether they were necessaries for this particular infant.

There is a distinction, you see, between an article which *may be* a necessary to an infant, and an article which *is* a necessary to the particular infant. Thus, a watch-chain is in its nature a very necessary article for a young man who possesses a watch (which is also a necessary), but it does not follow that in every case a jeweller who has sold a watch-chain to an infant can recover the price. Thus, the chain may be a gold one. Now a gold chain is the proper kind of watch-guard for a young man in a good pecuniary position, but it would be an extravagant purchase for a poor man. Therefore in the one case it would be a necessary, as it was held to be in Mr. Fleming's case, and in the other it would not be a necessary. The trader who supplied the chain to the rich infant could successfully sue his debtor for the price, while the shopkeeper who trusted the poor infant would have no remedy.

To show how the judges apply the doctrine laid down by Baron Parke, I will mention another case, which illustrates how articles purely ornamental cannot be necessaries, and cannot, therefore, be safely supplied on credit to a person under twenty-one. Mr. Wombwell, a member of a well-known Yorkshire family, moved, as one of the judges put it, "in what is called the highest society." He was

a close friend of the Marquis of Hastings, who owned racehorses, and being a good rider, often acted as jockey for his noble friend. Mr. Wombwell's own position was not altogether unsatisfactory, for he had an allowance of £500 a year during his infancy, and was entitled to £20,000 when he came of age. While still a minor, he ordered on credit a silver-gilt goblet, at the price of 15 guineas, and a pair of studs, price £25. The studs were for his own use; the goblet intended as a present for his friend the Marquis. Payment not being forthcoming, Messrs. Ryder & Co., who supplied the things, sued for the price, but unsuccessfully, for the Court decided that the studs and the goblet were not necessities.

But the mere fact that a gold watch-chain can ever be considered a necessary for anybody in the world, shows what an artificial or technical meaning the word has acquired. "As civilisation advances," says Mr. Shirley, "and luxuries increase, things become admitted into the class of 'necessaries' which, when simpler tastes prevailed, might have been dispensed with." To take an instance ready to hand, when tea and coffee were about 20s. the lb., no judge would have held either of these articles to be necessities, but nowadays no judge would dream of considering them luxuries. A few years ago, it would have been quite useless to sue an infant, of whatever position, for the price of a bicycle, but to-day, such a machine would probably be held necessary for a young man of fair position. The following things have been held to be "necessaries":—The hire of a horse for equestrian exercise; a volunteer uniform; wine for an aristocratic youth; but cigars and tobacco were decided not to be.

Besides the physical "necessaries"—food, clothing and lodging—it is not difficult to think of other things for which an infant would be legally bound to pay. He is especially deemed to want those things necessary for him to learn his trade or profession. Thus, a law student must have law-books, a medical student ought to have medical text-books; a carpenter's apprentice ought, I suppose, to be provided with saw and plane and adze; and so all these things are "necessaries." This, again, illustrates what I said before—namely, that "necessary" is a relative term, not an absolute one. It is impossible to specify a thing which can by any possibility be useful to anyone, and say positively that it is or is not a "necessary" for any particular infant in any particular case. I have already shown how the determination of this question must in all cases depend on the infant's position in life—his wealth or poverty, his father's means, his rank, his own line of study, and his trade, business, or profession.

There is one other matter to be considered, which is, whether or not the infant is already fully supplied with articles of the kind in question. For it stands to reason that a thing cannot be a necessary if the person who orders it is already fully supplied with other articles of the same kind. Thus, a copy of "*Coke upon Littleton*" would be held a necessary for a student for the Bar, but not two copies. The gold chain was held a "necessary" for young Mr. Fleming, but if he had ordered another, the second would have been a superfluity. The unfortunate part of it, from the creditor's point of view, is that the latter does not always know that his infant customer is fully supplied, for the law-student may order one copy of "*Coke upon Littleton*" at one shop, and another at another. The first bookseller



can recover the price of his wares, the second cannot. A carpenter under age would be liable to pay for one adze, but if he bought another on credit when he already possessed one, he could not be made to pay for the second.

I hope I make myself quite plain. A thing may be in itself of the "necessary" class—that is, it may be entirely for use, and not for show—and even then an infant cannot be sued for the price of it. It may even be a thing of a class especially "necessary" to the particular infant in his station of life—as a saw or plane for a carpenter, legal books for a law-student, a gun for a gamekeeper—but still he is not necessarily responsible. For he may escape scot free if he can show that when he bought the saw or the plane, the law-books or the gun, he was in possession of other things of the same kind, sufficient to enable him to pursue his calling or his studies.

I need hardly say, perhaps, that the above remarks only apply to *credit transactions* with infants. If a man of twenty buys of you a picture painted by an old master, which can be nothing but a pure luxury, and pays for it, the thing is done with. He cannot, in England, ask you to take back the painting and return the money.

In SCOTLAND, as I have explained on page 92, it is impossible to make a contract with a minor with any degree of certainty, unless his curator (guardian) joins in the contract to give his consent. But once that consent is given, the bargain, whatever it is, is binding. If the consent is not given, the minor can afterwards go back on the contract, and demand to be put into his old position again. He must, as fairness seems to suggest, return to the other party what he took from him. Thus, if he bought a picture for £150, without the authority of his curator, he can at any time demand the return of the money, but he must give back the picture. But what if the painting is lost or destroyed? Well, in that case the loss does not fall on the minor, but on the unfortunate dealer.

In ENGLAND, besides food, clothing, tools, and such things, education and instruction have always been deemed "necessaries." How far this goes I do not know, nor is it ever likely to be tested. If a hospital student went to a tutor to be "coached" for his examination, for instance, the teacher could sue the student, even if under twenty-one, for the proper fee. Clearly, this instruction is as necessary for a student as are his books, because both are equally necessary to enable the sucking Esculapius to qualify for his degree. Nor, I think, does the doctrine stop here. I think an infant is liable to pay for all instruction in useful knowledge, even if not immediately useful in his profession or business. Thus, a youth who went to a French class could be sued for the fee, even though he did not require a knowledge of the tongue of Molière in his intended occupation. But, as I said, I do not quite know how far this would extend. Thus, I cannot say for certain whether the same young man could be made to pay for dancing lessons. No such case has ever come before the Courts, but I should be inclined, in sporting phrase, to "back" the dancing-master, on the ground that dancing is a useful accomplishment, tending to take the clumsiness out of a young man, and to make him more graceful in his movements.

To sum up, an infant (minor) is liable for things of a necessary character that are actually necessary to him—that is, when he has not enough of them already. These “necessaries” include food, clothing, lodging, and instruction, and also various other things necessary for a minor’s advancement in life (e.g. tools).

(b) *Contracts of Service and Apprenticeship.*—An infant is bound by a contract of service, or a contract of apprenticeship, because such a contract is obviously for his benefit. A contract of apprenticeship, in fact, is on the same footing as an agreement for education, because it is, to a great extent, a contract for the instruction of the apprentice—learning the trade being the chief part of the agreement, as far as he is concerned. I do not intend to discuss the law relating to apprenticeship in any detail here, because it will form the subject of more detailed consideration in the chapter on The Workman (Book III., Chapter 10). It is sufficient here to say that a person under age is always legally bound by a contract of apprenticeship, unless the agreement is decidedly not to his advantage.

With regard to contracts of service, the reason why they are allowed to be binding on minors is because of their obvious advantage. If a master knew that a servant under twenty-one could break his contract without fear of consequences, one readily sees how difficult it would be for a minor to obtain a really good post, or, indeed, a situation of any kind. Masters will not pay good wages to people who are not legally bound to do the work for which they are paid. Now, since infants are liable on contracts of service because such contracts are, on the whole, advantageous to them, it follows that when a young man under age has entered into a service agreement which is not advantageous, he is not obliged to fulfil it. Do not let me mislead you. When I say “not advantageous,” I mean outrageously disadvantageous—so disadvantageous, in fact, that the certain disadvantages obviously, at first glance, are far greater than the possible benefits. In such a case it will be plain that the employer has taken advantage of the *employé*, and, therefore, the latter will not be held to the bargain. Adults are supposed to be able to look after themselves in a general way, but the law has a particular and peculiar regard for those who have not passed the mystic line of twenty-one, and will in all cases protect them, even against themselves.

(c) *Contracts brought about by the fraud of the infant* are binding on him. This happens when a person under twenty-one states that he is of age, and so induces someone to contract with him. The fraud must, however, be active—that is, it will not be enough to render the minor liable if he merely keeps silence, and does not say that he is under age. He will only be liable on the ground of fraud when he actually states that he is twenty-one. The idea is that though an infant may be too young to be able to take care of himself in matters of agreement, he is always old enough to know that he must speak the truth and abstain from fraud.

(d) *Marriage Settlements made with the Consent of the Court.*—As I have stated elsewhere, a person under age who marries is as legally married as an adult. But it sometimes happens that such a person has property, which is



is desired to settle—that is, to tie-up for the benefit of the husband, the wife, and the children (if any) of the union. Thus, a woman has, we will say, a little fortune of £1,000, and desires to marry Alexander Gordon. It will generally be for the lady's advantage that the money shall be settled, so that the income shall be paid to her during her life, by which means it is put out of her power to waste her fortune, either to gratify her own or her husband's extravagance. The way to do it is to make a deed, in which, in consideration of the marriage, the £1,000 is given to A T and B T, two trustees, whose duty it is to invest the fund, to pay the dividends to the lady so long as she shall live, and, when she dies, to divide the £1,000 amongst her children. Sometimes the husband also "settles" money or land in a similar way. Now, if the lady in question is under age, she cannot make a marriage settlement that shall be binding upon herself. If she makes one, she can set it aside after she comes of age, demand the £1,000 from the trustees, and make ducks and drakes of it.

But if she takes the trouble to apply to the Court of Chancery, that Court can give her leave to make an absolutely binding marriage settlement, provided she is over seventeen. The same thing applies to males, but in their case the age is raised. An infant of the sterner sex may have leave to make a marriage settlement only if he is over twenty. Let me say, especially for the guidance of those interested in the welfare of infants about to marry, that this power of the Court, which was conferred by the Infants' Settlements Act, 1855, can only be exercised when the infant, like Barkis of happy memory, is "willin'." There is no way of compelling young men or women under age to make a settlement on marriage, but it is a thing very proper for them to do, and for their friends to advise. In Scotland, such a settlement would only be binding if the minor's curator consented to it.

#### B.—MARRIED WOMEN

are the second class of persons whose capacity to contract is limited. At one time no married woman could make a contract at all, because her personality was merged in that of her husband. Since the Married Women's Property Acts (Scotland, 1881; England, 1882), this has been altered very considerably; but even at the present time a married woman's contracts have not quite the same effect as a single woman's. The single woman is in the same position as a man—that is, her contracts bind her personally, just as a man's contracts bind him. A married woman, however, is not personally bound by her agreements. It is only her separate property that is liable, and therefore, if she have no separate property, the creditor cannot enforce his debt. Since the Married Women's Property Acts, there is nothing to prevent a married woman from contracting, whether her husband likes it or not. The only difficulty is in the way of the creditor, if the lady does not carry out her share of the bargain. As the aggrieved party can only have a remedy if the lady has separate property, it becomes of the utmost importance to inquire **what separate property is**. The first thing to be ascertained is the date of the lady's marriage. In England, the day to be borne in mind is January 1st, 1883.

If the marriage took place on or after January 1st, 1883, in England, all the lady's property is "separate" property. It is not under the control of her husband, and is liable for her debts. That is simple enough. In Scotland, the date is July 18, 1881, and the Act only says that the lady's movable property shall be "separate."

The difficult part of the subject is reached when we have to consider the case of those women married before the dates mentioned. In their case the property may or may not be "separate." If it is not, it belongs to the husband, and is not liable for the wife's debts. Suppose a married woman wants to do business with you, and you try to find out her financial position, and you hear that she has money, that she comes of a wealthy family, had money and estates left her by relatives, and so on. You find out that her marriage was before January 1st, 1883 (or July 18, 1881, in Scotland). The next thing is to ascertain when and how the property was left to the lady. If she got it after the date named above, it is bound to be her separate property; but if before, it may not be. I say *may* not be, because it all depends on how it was left. Those of you who have seen old wills or old deeds of gift in which money has been given to women, may have noticed that they very often run in this form: "I give £150 to my daughter Jane for her separate use and benefit, free from the control of any husband she has or may hereafter have." The reason for making gifts in this form was that if the gift was simply, "I give £150 to my daughter Jane," and Jane was married at the time, or committed matrimony at some future date, the husband would take it all. But if the donation was "for her separate use," or in words to that effect, the property became Jane's "separate" property. Therefore, in the case of a woman marrying before the date mentioned, if the property was also acquired before that date, it is only "separate," and liable for the lady's debts, if it was left as separate property. But if acquired after that date, the Married Women's Property Act makes it "separate" in all cases.

When I say that a married woman's contracts only bind her separate property, and do not make her personally liable, as a man is, this is what I mean: If a man (in England) owes you money, and he has no property for you to levy execution on, you have still a remedy. You may issue what is called a Judgment Summons in the County Court; and, if you can prove that the debtor has had means to pay, the judge will make an order like this: The debt is to be paid by instalments of £1 a month. In default of payment, the debtor is to be imprisoned for so many days. But such an order cannot be made against a married woman, so that you have not the same means of enforcing your judgment against her as you have against anyone else.

Moreover, married women's property is often given to them in such a way that it is *restrained from anticipation*. This phrase requires, perhaps, some explanation. When property is restrained from anticipation it means that the woman cannot touch the capital, and may not anticipate, or handle in advance, the income. Thus, suppose a woman has a sum of £2,000, restrained in this way. The money will always be in the hands of trustees, who pay the lady the income quarterly, half-yearly, or yearly. Suppose it is quarterly, on the usual quarter-days. The trustees are bound to pay each quarter's dividends into the hands of the



woman herself, and to no one else. They must pay on quarter-day, and cannot pay before. And the woman is unable to mortgage or in anywise dispose of the £2,000 capital, or any part of it. Suppose she borrows money (£10, for instance) and tells the lender that he may have her next quarter's dividend to repay himself; nevertheless, he cannot lay his hands on the dividend, because the trustees dare not pay it to him. They must pay the woman, and her alone; and if they obey her request, and hand over the £10 to her creditor, she can compel them to pay her as usual—in other words, to pay twice. Of course, when she receives the income, she may repay the loan if she likes.

Again, in any other case but that of a married woman, a creditor could obtain judgment, and compel the trustees to pay the next dividends to him; but not so in the case of a married woman whose property is restrained from anticipation.

By the Conveyancing Act, 1881, the High Court may, on the request of a married woman, allow her to anticipate property, though it was given to her with the restraint attached. That is to say, if you give property to your married daughter, "without power of anticipation," she cannot touch the principal at all; nor can she touch the interest before it is due; nor can she mortgage, charge, or in any way bind either interest or principal; nor can her creditors seize any of it, *except by leave of the High Court*. And this leave is not very easy to obtain. I will tell you why. It is because the power of the Court to override your intention is only to be exercised for your daughter's benefit and at her request. In other words, if she is ever so deeply in debt, her creditors have no right to come to a judge for leave to seize the "restrained" property. Your daughter must herself ask to have the restraint removed.

The next point to be noticed is, that as the Court can only give leave to "anticipate" when it is for the benefit of the married woman, even if your daughter asks, she may very easily be refused. This is the kind of case that is typical—showing when the Court will and when the Court will not permit anticipation. Mrs. A had about £20,000, from which she derived an income of about £600 a-year. The lady herself might have managed to live within her means; but her husband was extravagant; she was foolishly kind, and spent a great part of her dividends in paying his debts. Then she borrowed money—really for him—to the extent of about £4,000, and ran into debt in other ways to the tune of another thousand. Under the load of such liabilities, Mrs. A soon began to be unhappy. All her creditors either sued or threatened to sue her at once, and in these circumstances she applied to a Chancery judge for relief, as the property was restrained from anticipation. The judge allowed the trustees to pay £5,000 of the capital to the lady, so that she started fair again—with a diminished income, it is true, but with an increase of experience.

In about five years' time, things were as bad as ever. Mr. A had run into debt again. Mrs. A had borrowed largely, and her creditors were pressing. Again she applied to the judge for leave to handle some of her capital; but this time his lordship refused. One reason for the refusal was that Mrs. A had borrowed at an exorbitant rate of interest, and had borrowed from professional money-lenders. Besides, the mere fact of the second application in so short a time showed that the

money was being wasted ; and the judge did not think it for Mrs. A's benefit to allow her to waste her whole substance.

To recapitulate:—A married woman can now make any kind of contract, but her liability is restricted to the amount of her separate property. It is not wise to enter into contracts with married women, when the contracts are of great magnitude, before finding out whether their property is restrained from anticipation or not.

### C.—INSANE AND DRUNKEN PERSONS.

**The Insane.**—Insane persons are, roughly speaking, in the eye of the law divided into two classes : namely, those who have been legally declared to be insane, and those who, though in fact *non compos mentis*, have not been declared to be insane by the proper authorities. Those unfortunates whose lunacy has been properly investigated, and who have been placed under restraint, need not be discussed here, because they never make or try to make contracts. Their affairs are in the hands of somebody appointed for the purpose, called a committee (or curator). The duties of the committee, his powers and liabilities, will be considered when we are dealing with Inheritances and Trusts, because those duties, powers and liabilities are akin to those of a trustee (Book V., Chapter 4).

The class of the insane with whom I am concerned in this section is the large class of persons whose reason has lost its balance, but who are neither in asylums nor have been legally declared to be insane. The contracts of these persons may be good and valid, or invalid and bad, according to circumstances. A very good illustration is to be found in a case which attracted considerable public attention some time ago. A professional gentleman whom we will call Mr. Nihil made the acquaintance of a young woman, of whom he was enamoured. One day he asked her to marry him, and she consented, on the understanding that he would put his promise of marriage into writing, the which he did, then and there. Always a little eccentric, and addicted, besides, to overmuch imbibing of strong drinks, Mr. Nihil speedily developed such alarming symptoms that two doctors were called in. They very soon saw the state of the case, and without hesitation certified their patient to be of unsound mind, with the result that he was carried away to a lunatic asylum. This happened only two days after the promise of marriage had been made. Of course, no wedding could take place with a lunatic for a bridegroom, because the one contract which a lunatic can by no possibility make is a contract of marriage. If a lunatic—whether legally declared to be so or not—goes through the marriage ceremony, he (or she) is still not married.

Now, Mr. Nihil eventually recovered and became of right mind, and then the lady demanded the performance of his promise. He, however, had no recollection of having signed the paper, and refused to be bound by it. The usual action for "breach" ensued, and Nihil defended on the ground that he was insane when he was said to have promised to marry. The judge who tried the case asked the jury two questions : (1) Was Nihil insane when he entered into the engagement? (2) Did the lady know, or had she reason to suspect, that he was not in his right mind? To both queries the jury answered "Yes," and the judge then declared that in law the promise was voidable—that is, that Nihil could, when he came to his



senses, either hold to it or reject it. As he had chosen to reject it, there was no contract to marry, and therefore there could be no breach of promise.

This case shows exactly what the position of a lunatic is in regard to contracts. If you make a contract with a man who is insane, and you know him to be insane, or he by his demeanour and conduct gives you good reason to suspect that he is out of his mind, you cannot enforce the contract. When he recovers his reason he may, if he chooses, "ratify," that is, declare his intention of holding to the bargain; but if he does not ratify, the agreement is off. Now this "ratification" may be accomplished in many ways. The simplest is, of course, when the ex-lunatic, on having his attention called to the contract, expressly declares his intention in so many words. He may also accomplish the same end by doing some act which recognises the existence and validity of the contract, or even by permitting something to be done which shows that he is aware of and recognises the agreement.

Instances are not far to seek. If you have entered into a contract of partnership with a man who was a lunatic, and whom you knew, or ought to have known, to be *non compos mentis*, and he has to be put into an asylum soon afterwards; and when he recovers and is released he begins to come about the partnership premises and to act as a partner usually acts—giving orders to the employees, seeing customers, and so on—this is ratification by positive act, and he will not afterwards be allowed to escape partnership liabilities on the ground of being insane when he made the agreement. The answer to such a plea would be: "True, you became a partner when insane, but you continued to act when you became sane again."

Another case:—Jones, knowing Green to be of weak intellect, induces him to borrow £20 and give a promissory note for £100. Green goes into an asylum before the note falls due, and is afterwards discharged as cured. When he comes out he receives a letter demanding payment, and to this he replies, sending a cheque for £5 on account. This is a ratification of the contract.

Take, now, the case of ratification by mere passivity—merely doing nothing. Mr. Squeers, when labouring under a fit of insanity, engages Miss Rebecca Sharp as his children's governess. When he recovers she continues to teach his children and perform the duties of a governess without comment one way or the other. Mr. Squeers simply takes no notice of her, either to give her orders or otherwise. This behaviour ratifies the contract of service. Why? Simply because, when he became rational, the master, seeing a lady in his house, teaching his children, ought to have asked how she came to be there. He cannot wait till quarter-day, and, when she asks for her salary, reply that he does not remember having engaged her. That would not be, by any means, good enough. If he did not remember making the agreement, he ought to have asked about the lady as soon as his reason returned, and to have dismissed Miss Rebecca instantly if he wished. As I have already explained, although mere silence cannot give consent, nor can it make a contract, yet conduct, without act or word, may make one. And it is even more easy to ratify a contract by acquiescence only, than it is to make one. As one of our old legal luminaries once said, "Ratification consists of any act, conduct, or declaration, which recognises the existence of the promise as binding."

In each of the three instances given above, I have assumed that the man who was insane when he contracted afterwards became sane. But there are, as we all know, numberless cases where the light of reason, once extinguished, is extinguished for ever, and the patient never returns to his friends in his right mind. Suppose, for instance, that in the case of the partnership given above, the lunatic dies in the asylum after lingering there for a number of years. What happens? His affairs are taken over by his "committee" (p. 365), and this person has exactly the same rights as the lunatic would have had, had he returned to reason. That is to say, the "committee" may either affirm or reject the partnership. In the one case he will take all benefits and undertake all responsibilities as a partner, but for the benefit of the lunatic's estate; in the other, he will disclaim at once responsibility and profit. Now, it is the "committee's" duty to act in the way most profitable for the estate. Therefore, if the contract be a lucrative one, he ought to affirm it; if it be a losing one, he should promptly disown it. He will not be allowed to blow hot and cold, or, to change the metaphor, to "sit on a fence." He must make up his mind quickly, and elect either to ratify or to reject; and when he has elected, he must abide by his decision. The law does not allow to anyone the feminine privilege of changing the mind.

In the previous page, I have stated the position of one who makes a contract with someone whom he ought to suspect of being insane. When a man's conduct and demeanour are of such a kind that a reasonable man would doubt his sanity, pray do not rely on your contracts with that man. For if it should turn out that he was insane, your position will be the same as if you knew him to be of unsound mind. In legal phrase, "you have notice of his insanity." For if a man's actions are so strange that they can only be accounted for on the theory of mental derangement, that ought to be as good a warning to you as if he went about with a placard on his back marked "Lunatic."

There was a case in Scotland in the early 'seventies, illustrating this point. A woman of weak intellect was living with her brother. She had not been declared insane, but you can tell what her brother thought of her condition, when you know that on one occasion, somebody having paid her a cheque for over £700, the brother took it away almost by force and put it in the bank. This, however, was not the incident out of which the lawsuit arose. That incident was as follows:—The brother one day went to the sister's bank with a cheque, signed by her, for about £200; which cheque he duly cashed. The money, according to his account, he paid over to his sister—what she did with it nobody could find out. Not long afterwards, the sister was declared, in proper legal form, to be a lunatic; and the "curator" (who answers to the English "committee") brought an action against the brother for the proceeds of the cheque. The defender said that he had paid it, or accounted for it, to his relative; but being called upon to produce clear evidence of the fact, was unable to do so. Consequently, he had to pay the money to the "curator." This case was rather a sensational one, from the fact that the "curator" at first charged the brother with having forged the cheque, but withdrew the accusation when the trial was about half-way over. The law on the subject of contracts made by insane persons is exactly the same in England and Scotland. In both countries, one who is subject to fits of insanity, relieved



by intervals of reason, is bound by such contracts as he makes during these lucid intervals. In both countries, also, after a man has been declared insane, you cannot make a contract with him at all. His capacity to perform any legal act has entirely gone.

You may, perhaps, have inferred from the preceding paragraphs that if you enter into an agreement with a lunatic who has not been declared a lunatic by legal process, and whom you had no reason to regard as insane, the contract is a binding one. It is only when he is out of his mind, *and* you had reason to suspect the fact, that the validity of the transaction can be called in question.

**Drunken Persons.**—Drunkenness may or may not amount to a sufficiently irrational state of mind to put the drunken man in the same category as the insane. For drunkenness does not usually lead to entire loss of the mental faculties. A lunatic loses both memory and reason. A drunken man is merely confused in his mental faculties; he does not lose them altogether. As Chaucer puts it:

"A dronke man wot well he hath an house,  
But he not which the righte way is thither."

If a man in liquor is in such a confusion of mind that he does not know and cannot understand the effect of the contract he is making, he is treated just as a lunatic would be. That is, if the other party to the agreement knew, or had reason to believe, that drunkenness existed, the contract is voidable. When the inebriate returns to sobriety, he has the choice of accepting or rejecting the bargain. If he intends to reject, he ought to lose no time in declaring his mind upon the matter; for he will be adjudged to have elected to stand by the agreement if he does not speedily announce his disapproval, as soon as he hears of the contract.

As in the case of insanity, the law relating to contracts by drunken persons is the same in Scotland as in England. And it is also the law that if you make a contract with a man who is drunk, and you do not know him to be drunk, and have no reason to believe that he is drunk, he will be bound by the contract, and cannot escape from it when he becomes sober.

#### D.—CORPORATIONS AND COMPANIES.

A Corporation is an artificial person—a body which has an existence only in the eye of the law. As somebody has said, "A corporation has neither a soul to be saved nor a body to be kicked." It is everlasting in its nature, for its existence is quite independent of the lives of those people who are its members at any particular time. Take a Municipal Corporation, for example. It is composed of the Mayor (or Provost), Aldermen (or Bailies), and Town Councillors; but if a modern Guy Fawkes were to appear at Birmingham, and blow up the Lord Mayor and the Aldermen, the Town Councillors and the Clerk, the Municipal Corporation of Birmingham would still be alive. New members and officials would have to be elected, but in the eye of the law there would be no break in the continuity of existence of the Corporation. There are, besides corporations consisting of many persons, corporations of one person only. Thus, the Bishop of London, considered as a bishop, is not a man,

but a corporation. As a man, he cannot expect to survive more than the allotted span of threescore years and ten, but as a bishop he never dies. The same applies to the vicar or rector of a parish.

And the thing to remember in contracting with these corporations, whether they be corporations sole (*i.e.* consisting of one man only) or corporations aggregate (more than one person), is this :—*A corporation has only power to make contracts such as its charter of incorporation permits ;* and these are limited to such agreements as are specified in the charter itself, and such others as are necessary to enable the corporation to do its work.

First, to explain the term “charter of incorporation.” This phrase means the document or documents by which the corporation was formed. Thus, the University of London was created by a Charter granted by the Queen in Council. Railway and Tramway Companies are invariably created by private Act of Parliament. Municipal Corporations are, and were, created in various ways : some by Royal Charter, others by local Acts of Parliament. Boards of Guardians are called into being by Orders of the Local Government Board. And, lastly, Limited Liability Companies, the most common of all, come into existence by means of a Memorandum of Association, signed by seven persons at least, drawn up in a certain form, and deposited with the Joint Stock Companies’ registrar at the Inland Revenue Office. These Companies will form the subject of a later chapter.

I have already shown (p. 287) that a corporation, except in cases of trivial contracts, or where it would be so inconvenient from daily occurrence as to be well-nigh impossible, must affix their common seal to all contracts. Here I wish to point out, as well for the benefit of members of corporations as for the guidance of those who deal with them, that a corporation, of any kind, has not the same liberty to enter into contracts as a private person has. The reason is that a corporation, being strictly the creature of its charter, is tied to the limits of that document. That is why a Town Council often has to secure a new Act of Parliament when it wants to work the tramways instead of allowing private companies or persons to work them. The new Act is necessary because the original charter did not give the Council power to do what it now wishes to do. And the peculiar part of the business is that if a corporate body of any kind agrees to do something that its charter gives it no power to do, the agreement is not binding on anybody. In fact, in law there is no agreement. Take a railway company, generally formed with powers to make and work a line over certain districts, and to do all things necessary to carry on the line. They can make contracts to build engines, etc., and even with a tailor to supply all their servants with uniforms ; because a railway station is better managed if all the porters, etc., have a distinctive dress, and it is reasonable that the company should supply that dress to its servants. But they would not be at liberty, without the special permission of Parliament, to buy ordinary clothes and set up shops to sell them in their stations. Such a course of action would be called, in legal jargon, *ultra vires*—beyond the powers of the railway company, and all contracts made on account of the business would be void. So that the people who sold the material, etc., could not sue for the money ; nor could the company bring actions against them for breach of such contracts.



I know it is difficult to make people in general comprehend the reasons for the following rule, yet the rule exists, and is most important to be known :—

The directors of a company or other corporation make a contract beyond the limits of its charter ; that contract is not of the least validity, nor can it be made binding on the corporation even if all the members, at a general meeting, assent to it.

This proposition is borne out to the full by the case of The Ashbury Carriage and Iron Company against Riche. Mr. John Ashbury had carried on the business of a railway contractor and mechanical engineer, his chief trade being to supply railway carriages, waggons, points, crossings, and, in fact, almost every kind of fitting or mechanism required by railway companies. But Mr. Ashbury never had been a railway engineer or contractor, in the sense of being concerned in the construction of railways themselves. In 1862 a Company was formed, under the Companies Acts, to buy and work Mr. Ashbury's business. These Acts require that at least seven persons shall sign a document called "The Memorandum of Association," which must set forth the capital, number of shares, and the objects of the Company ; and this, as I have mentioned before, is the Company's "charter." Now, the memorandum of the Ashbury Railway Carriage and Iron Co., Limited, thus defined its objects: "To make and sell, or lend on hire, railway carriages and waggons, and all kinds of railway plant, fittings, machinery, and rolling-stock ; to carry on the business of mechanical engineers and general contractors ; to purchase and sell, as merchants, timber, coal, metals, or other materials ; and to buy and sell any such material on commission or as agents."

Mr. Riche was a railway contractor in Belgium, and he heard of two people named Gillon and Bertsoen, who had obtained a concession from the Belgian Government to make two lines of railway. In England one might better call a concession a favourable contract in the nature of a monopoly. Eventually Riche introduced Messrs. Gillon and Bertsoen to the directors of the Ashbury Carriage Company, and the latter agreed to purchase the concession and to employ Mr. Riche to construct the line. Thus, in effect, the Ashbury Carriage Company was entering into the business of railway construction. The scheme was laid by the directors before the members of the Company, who unanimously agreed to it. In fact, at the time, the speculation looked so healthy and so likely to result in huge profits, that it would have been surprising had even the usual minority of one been found at the meeting. It was the year 1864 when the Company found itself so harmonious, and accordingly in that year Mr. Riche was instructed to go on making the lines. Mr. Riche was willing and anxious, and he pushed on the work at once ; but railway construction is an expensive undertaking ; and money had to be found ; and the Ashbury Company had to find it. So they went on until 1867, when some of the Ashbury shareholders became a little tired of this continual and continuous process of paying to Mr. Riche all the profits that had been made on the other branches of the concern, and, as shareholders will, they protested in warm terms against the action of the directorate. For, as Mr. Perkin Middlewick used to say in *Our Boys*, "You do as I ask you to, Charlie, my boy, and I'm ile. But refuse to obey my wishes ! and I'm ile still—but it's ile of vitriol !" So the shareholder robbed of his dividend for a year or two may

be still "ile," but it's "ile of vitriol." A committee was appointed to investigate, and in the end the shareholders decided to repudiate the contract with Riche, if it were possible to do so without rendering the Company liable in damages.

Accordingly an action was begun in which Riche was plaintiff and the Company were defendants, asking the opinion of the Court upon the point. The case was carried through three Courts to the House of Lords, with the result of a final judgment in favour of the shareholders of the Company—in other words, it was held that the contract was bad from the beginning. It was bad, not because there was anything illegal about the contract, but because one of the parties to the contract had no power in law to enter into it. I need scarcely say that the sympathy was all with Riche, who had acted in good faith all through, and it was felt to be a hard case for him. But the Court remembered that "hard cases make bad law," and refused to strain the law merely to give effect to their sympathies for the unfortunate contractor. The result of the case, though a misfortune for Riche, has been of great service to shareholders, because it has prevented directors from launching into many schemes on the chance of getting them ratified by the shareholders in an enthusiastic moment.

It would, of course, be impossible in a work of this character to give details of all the corporations in Great Britain, and of the contracts which they may or may not enter into. I must content myself with stating the law in general terms, laying down this working rule :—Be careful, when you enter into a big contract with a corporate body, to be sure that they have power to make the contract. And remember that a corporation is any body, not a partnership, incorporated under the Companies Acts, or under a Royal Charter, or any Act of Parliament.

#### E.—BANKRUPTS.

**Bankrupts.**—A bankrupt is a person who, being unable to pay his debts in the ordinary course as they become due, is declared by some Court to be insolvent. Both ancient and modern law have always declared it expedient to allow the interference of the law in such cases, so as to divide the debtor's property fairly amongst his creditors, and to prevent one creditor from swallowing everything. In the old days, both in England and Scotland, a bankrupt was regarded as a criminal and was punished by imprisonment ; but the policy has been changed in the reign of Queen Victoria, and a bankrupt, as such, is no longer a felon. And the difference between old and modern bankruptcy law is, that whereas in former times no one but a merchant or trader could be bankrupt, nowadays anyone can be.

The debtor may be declared a bankrupt either at his own request or at the request of one or more creditors to whom he owes £50 or over (£70 in Scotland). After the request has been made he can no longer be made liable for a debt or under a contract, though in Scotland he must ask the sheriff for a protection order against arrest. The first thing to be done under the bankruptcy is for the creditors to meet and elect a trustee, who shall take charge of the bankrupt's estate, collect debts due to him, and in course of time pay the proceeds to the creditors. The bankrupt then has to be examined as to the causes of his failure, etc., and six months after his examination is over he may apply to the Registrar (in England)



or the Sheriff (in Scotland) to be discharged. If he be discharged he starts afresh in life.

In this place I merely wish to point out the effect of bankruptcy upon a man's power to make contracts. In England it has no effect, except that an undischarged bankrupt must not allow anyone to give him credit to the value of £20 and upwards without revealing the fact that he is an undischarged bankrupt. Even then the contract for such credit is not void. The bankrupt has committed a misdemeanour, for which crime he is liable to be sent to prison ; but he is bound, if he is able, to pay his debt when he comes out. In Scotland the rule is much the same, except that a Scottish undischarged bankrupt must not incur any liabilities without informing his creditors of his true position. If he does, he is punishable.

## SECTION V.

### CONDITIONS IN AND OF CONTRACTS.

Conditions precedent and subsequent—A broken condition cancels the contract—Every nominal condition is not really one—Difference between true and false conditions—Warranties do not go to the root of contract—Conditions do—Conditions as to time—Conditions in building and engineering contracts—Architect's certificate—Architect to arbitrate—Conditions in commission contracts—When the commission is to be paid only by results—Arbitration clauses—How enforceable—Arbitrator must be impartial—Duties of arbitrator—Misconduct of arbitrator—Conditions as to demand—As to notice—As to approval—As to mutual performance—As to valuation.

It is the commonest thing in the world for a contract to be made subject to a condition ; and these conditions vary so infinitely that it is impossible to attempt to give anything like a list of them. I can, therefore, in this section, merely deal with the general effect of conditions, and give a few common instances.

The broad division of conditions is into Conditions Precedent and Conditions Subsequent. The first kind defines a condition which must happen before the contract takes effect at all. In other words, the happening of the condition must precede the contract : the agreement being only *in embryo* until that event takes place. The following agreement is one which depends upon such a condition :—

"John Jones agrees that *if Thomas Smith approves* of William Robinson's bay horse, Beauty, he (John Jones) will buy the said horse from William Robinson, and William Robinson will sell the said horse for one hundred guineas."

You see, if Smith approves the horse, there is a binding contract of sale between Jones and Robinson ; but if such approval is not given, there is no bargain.

A Condition Subsequent is where an agreement fully binding is made, but subject to an agreement that if something should happen (or not happen) afterwards, the contract is either to be cancelled *in toto*, or else it is to be altered in some way. Such, for instance, would be an agreement of this kind :—

"John Jones agrees to buy and William Robinson agrees to sell the bay horse, Beauty, at the price of one thousand guineas ; but subject to the condition that *if the horse fails to win* either the Derby or the St. Leger, John Jones shall be at liberty to return the horse and demand the return of the one thousand guineas."

You see that here there is a contract now ; but it is liable to be cancelled if

one of two events does not happen—that is, if Beauty fails to win one of the two races. Should he gallop in a winner of the first contest, Jones has no longer the option of cancelling the contract. And even if he loses the first race, but wins the second, the contract becomes unbreakable.

Now, conditions play a very important part in the law of Contract; for it is the rule that **a broken condition entitles the other person to declare the contract off.** He need not do so unless he likes: he can decide to go on with the agreement, and sue you for damages for not performing the condition. Take this case: You agree to sell 100 tons of coal to a manufacturer, to be delivered on the 1st of June. In the sale of merchandise, the time agreed on for delivery is, as a rule, a condition of the contract. For you can have a condition in a contract without calling it a condition. Suppose you do not deliver the coal on the 1st of June, your customer has the right to do one of two things. He may refuse to take the coal if you proffer to deliver it late, cancel the contract, and bring an action for damages for the breach. Or, when you deliver the coal a few days late, he may take it, pay the price, and make you pay him the damage he has sustained by your delay. When I come to Contracts of Sale of Goods, I will explain what the damages in each case would amount to.

You ought to be careful how you insert conditions in contracts. Many a man has found himself barred by a condition from obtaining what he thinks, and reasonably thinks, he is entitled to. At the same time it should be observed that every so-called condition is not a condition in law. In law, a condition is always a term of the agreement which goes to the very root of the contract. It is, as lawyers say, “of the essence” of the contract. Now, there are terms that may be inserted in contracts, and frequently called conditions, that are in reality only “warranties.” Such as this, for example:—“A B engages C D to act at his theatre, at a salary of £5 a week. Conditions: (1) C D shall be punctual in his attendance at rehearsals. (2) C D shall be ready to play at least five times a week if called upon.” And so on.

Now these are not really conditions, though they may be called by that name in the contract itself. And it is important to distinguish them from real conditions, because if a condition (in the legal sense) is broken, the other party has a right to cancel the agreement. You can see how absurd it would be if A B had the right to cancel C D's engagement on C D turning up three minutes late to one rehearsal. Yet if the clause about punctuality were a condition, A B would have the right to cancel the whole engagement. The clause is, then, simply a warranty of punctuality; and if C D is unpunctual, A B has the right to ask for damages only.

The whole question of “condition,” or “no condition,” depends on the plain intention of the parties—which intention will be inferred, not from the use of any technical words, but from the contract regarded as a whole. Now, as people are always assumed to contract reasonably (unless they contract unreasonably in such plain terms as to leave no doubt that they intended to be unreasonable), and as it would clearly be unreasonable to allow a man to cancel a contract if the other party failed to perform some comparatively unimportant term, therefore the distinction is made, as I have indicated, between terms which go to the root of the



contract and terms which do not. The former only are conditions. If they are not carried out, the other party may refuse to have anything more to do with the agreement. The latter are called "warranties"—terms which the party warrants to carry out. If he does not carry them out, he must pay for his breach of warranty, but that is all. As a warranty does not go to the root of the contract, the other party has no right to cancel the contract for breach of warranty.

The following two examples will, I think, clearly show the difference between Condition and Warranty.

Madame Poussard was an operatic singer who had been engaged by Messrs. Spiers and Pond to play the principal part in Lecocq's opera of *Les Prés Saint Gervais*, at the Criterion Theatre, London. The contract ran in these terms: "You to play part of Friquette in Lecocq's opera of *Les Prés Saint Gervais*, commencing on or about the 14th of November next, at a weekly salary of £11, and to continue at that sum for a period of three months, providing the opera shall run for that period. Dresses and tights requisite to the part to be provided by the management, and the engagement to be subject to the ordinary rules and regulations of the theatre.

"(Signed) E. P. HINGSTON, Manager.

"*Ratified.* Spiers & Pond."

The words, "commencing," etc., in italics are those upon which the case was eventually fought. Let me preface my comments on the case by saying that a term or clause as to **time** in a contract may be either a condition or a warranty, according as it is or is not of the essence of the contract. In other words, when you agree to do a thing for me on the 20th of July, and if you don't do it then, it will be of no use for me if you do it afterwards—I can cancel the contract provided you are not punctual. Time, or punctuality, is a condition of the contract. But if it does not matter much whether the thing is done on the 20th or the 21st, or within a week—that is, if you can compensate me by paying damages for delay—I am bound to accept performance later than was agreed, with compensation for unpunctuality.

Now let us apply this to Madame Poussard's agreement. The opera was slightly delayed, owing to the composer not completing the music in time; but Madame Poussard did not object to that, and when the first night was fixed for the 28th of November, she diligently attended rehearsals so as to prepare herself for the part she was to play. But on the 23rd of November, sickness supervened, and the doctor who was called in ordered the *prima donna* to her bed. The trouble of the manager was pitiable. He must engage a *prima donna* at five days' notice—a capable one, at that—or the new opera would fail. In his distress he turned to Miss Lewis, a talented young lady, who undertook to study the part, and if Madame Poussard did not recover by the 28th, to play the part up to the 25th of December, at £15 a week (£4 more than Madame's salary). On Thursday, the 4th of December, the French *prima donna* had recovered, and wrote, offering to take her part. The management, however, who were quite satisfied with Miss Lewis, refused the offer, and said that the contract had never come into force, because there was a condition precedent that Madame Poussard should be ready to take her part on the opening night.

They said that time was a condition of the contract ; and the argument was this : " In the production of a theatrical piece, almost everything depends upon the first impression. It is, therefore, of the utmost importance to secure first-class talent for the opening performance. Now, when Madame Poussard was taken ill, we had to engage someone to fill her part. That part was the principal one—the one on which the opera hung. It would have been suicidal for us to entrust the part to a second-rate artiste, and a first-rate one could only be procured upon an engagement for a considerable time. Miss Lewis, or anyone of her standing, would not have accepted the part simply to fill it indefinitely until Madame Poussard recovered. In other words, we (Spiers & Pond) were bound to engage another first-class artiste, and to engage her for a fairly long period. That being so, it is evident we could not be expected to continue our contract with Madame Poussard as well." The argument prevailed and Madame Poussard lost her case.

Now for the other side of the line, as illustrated by a case that occurred in the same year as Madame Poussard's. Mr. Bettini was a great operatic tenor, with a European reputation, and him Mr. Gye, the manager of Covent Garden Opera House, engaged to sing during the opera season in London. The contract entered into was a long one—far too long for me to set out in detail ; but the main parts of it were the following clauses :—

(1) This engagement shall begin on the 30th of March, 1875, and shall terminate on the 13th of July, 1875.

(2) Mr. Bettini agrees to be in London without fail at least six days before the commencement of this engagement, for the purpose of rehearsals.

(3) Mr. Bettini undertakes to fill the parts of *primo tenore assoluto* in the theatres, concert-halls, and drawing-rooms, both public and private, in Great Britain and Ireland, during the period of his engagement with Mr. Gye. Salary £100 a month, payable monthly.

(4) During *the whole of the year 1875*, Mr. Bettini shall not sing anywhere out of the Royal Opera House, Covent Garden, without the written permission of Mr. Gye ; except at a distance of 50 miles from London, and out of the season of the theatre.

Under clauses (1) and (2), the singer ought to have been in London on the 24th of March at the latest ; but, owing to illness, he was detained at Milan, and did not arrive in England until the 28th—two days before the commencement of the engagement instead of six. Mr. Gye alleged this to be a breach of clause (2), as indeed it was, and further he said that clause (2) was a condition of the contract, and absolutely refused to go on with the agreement. Mr. Bettini, on the other hand, contended that the clause was not a condition, for various reasons. In the first place, Mr. Gye had already had some benefit from the contract, under clause (4), because from January 1st to March 28th, the singer had considered himself bound by the contract not to perform elsewhere in the United Kingdom. In the second place, it could not be said that the contract for the six days' rehearsals was of vital importance to all the rest of the agreement, or that the failure to rehearse would practically cause a total loss of the value of Bettini's services to Gye, because the artist was to perform not only in opera, but also



at concerts and in drawing-rooms—for which, it was maintained, no rehearsal would be necessary.

Taking all the circumstances together, then, the eminent judge (Lord Blackburn) who decided the case, came to the conclusion that the six-day rehearsals clause was not, in its nature, a condition ; further, that it would be unreasonable to suppose that when the agreement was made, it was ever intended to enable Mr. Gye to break off the engagement if Mr. Bettini came to rehearsal five days or four days, or even two days, instead of six days. As his lordship very pertinently observed, "If they intended such a consequence to ensue, why did they not make clause (2) read, 'Mr. Bettini agrees to be in London without fail at least six days before the commencement of the engagement, for the purpose of rehearsals. If Mr. Bettini fails strictly to perform this part of the agreement, Mr. Gye shall be at liberty to cancel the engagement' " ? Of course, a plain declaration that the rehearsal clause was to be a condition would have made it a condition, because the whole law relating to the interpretation of clauses in contracts has to do with finding out the intention of the parties. The question invariably asked is, "What did they intend by these words ?" If the intention is clear, no more is to be said. It is only when the intention is not plainly expressed that the judges are driven to scan, with closest attention, the words used, and to try to make out from them a reasonable meaning. In the case of *Bettini v. Gye*, the intention was not plain—it was possible to read clause (2) either as a condition or a mere warranty, and, the latter being the more reasonable, was held to be the correct interpretation.

Let me reiterate, because it is a point very frequently misunderstood. If there is, according to the contract, something to be done by the other party, before you can be called upon to do your share, and the other party fails to do that thing quite properly, you cannot refuse to do your part unless the thing that he failed to do was of the very marrow of the contract. It depends, therefore, entirely on the importance of the thing, whether there is a condition or not.

But—and this is important—you can make a term of a contract a condition, by special agreement. Suppose, therefore, that there is something upon which you place special importance, the proper thing is to put into the contract a special clause, like this : "It is agreed that if A B fails to carry out clause so-and-so strictly, C D shall be at liberty to rescind [cancel] this contract." After that there can be no mistake.

I want you very carefully to note that although the Courts will not readily declare a term of a contract to be a condition unless the contract itself says so, yet once such a term is decided to be a condition, it will be enforced with the very greatest strictness. There is only one exception to the rule of strict enforcement of conditions, and that is in the case of mortgages (Book IV., Chapter 1).

But the exception, as people say, proves the rule, and I wish to make it plain that if you make a contract with Blank, subject to the condition that if you do not perform a particular part of your share of the bargain he is released from his share, you will be strictly and severely bound by that condition. Suppose, for instance, you agree to supply 1,000 tons of coal in two instalments of 500 tons each, the first instalment on Tuesday and the second on Friday, and you agree

that if you are late with the first delivery, Blank shall be entitled to refuse to take any of the coal. If you do not deliver the 500 tons on Tuesday, Blank is entitled to refuse the whole 1,000 tons and to sue you for breach of contract, not merely for non-delivery of 500 tons, but for non-delivery of 1,000 tons.

Now let me take one or two instances in everyday business life. I want a suit of evening dress clothes specially to attend a Royal reception on the 1st of June. I go to my tailor, Mr. Goodfitte, and tell him that I want the clothes made and delivered on or before 12 o'clock, noon, on June 1. I also tell him that if I do not have the suit by the time named it will be of no use to me. He undertakes to carry out my order. Should he deliver the clothes a moment later than the time specified, I can refuse to take and to pay for them. Why? Because the contract was conditional on the time being faithfully kept.

On the other hand, if I simply order a suit of clothes and ask for them to be sent to me on or before the 1st of June at 12 o'clock, and do not make a special condition as to the time being punctually observed, I cannot refuse to take and pay for the goods, even if they are a day or two late. Why? Because, as a rule, the delivery of a suit of clothes a few days late does not render them useless to the purchaser, and I did not tell the tailor that I wanted them either punctually or not at all. Is there, then, no obligation on the tailor to deliver at the specified time? The answer is, certainly; and if I have suffered any loss through his delay I can recover that loss in an action for damages for breach of contract. But there is all the difference in the world between this and the right to cancel the contract altogether.

You can see, without much explanation, that if a lady orders a Court dress wherewith to array herself for a particular Drawing-Room, it is essential that the garment should be sent home in time. But it is by no means so essential for the dressmaker to be punctual in delivering an ordinary gown. In the one case time is a condition of the contract; in the other it is not.

A further thing to note is, that not only must you in your own mind regard the term in question as essential, but you must *either* tell the other party so, *or* it must appear in itself to be essential and of the first importance.

There are only a few more general matters to observe in connection with conditions in contracts. The first is, that when you make a contract with X Y subject to a condition to be performed by him, and he does not perform that condition, you must cancel the contract at once if you intend to cancel it at all. If you do not, it will be assumed that you mean to give up your strict right, and your only remedy will be an action for damages (if you have sustained any). Thus, the lady who orders the Court dress for a particular occasion may refuse it if it be delivered late. But if she once accepts delivery she cannot afterwards return the gown. She has, by accepting delivery, waived (*i.e.* yielded up) the right to refuse it altogether. Her only remedy is to compel the dressmaker to take something off the price, by way of damages for late delivery.

The second point to which I would draw your attention is this:—If you, by your act, or your neglect, put obstacles in the way of X Y performing the condition, you cannot insist on his performing it. Thus, if the great lady orders the dress on the 20th of April, wherewith to attend her Majesty's Drawing-Room on the 6th of



May, and promises to be ready for the "fitting-on" on the 1st of May, and the great lady, having another engagement, fails to keep time with the *costumier*, the latter is exonerated from her condition as to the time of delivery, and the grand dame has no right to refuse the gown if it is delivered late. She is not even entitled to an allowance for late delivery. It happens not seldom that a person under a condition is released from its effect by the act, default, or neglect of the party in whose favour the condition was made. Therefore, when you seek to cancel your agreement with X Y, on the ground that he has broken a condition, ponder well, and consider whether you yourself have been blameless in the matter. Do not attempt a cancellation if you have doubts that you yourself have prevented the condition from being performed.

I well recollect a case, perhaps an extreme one, illustrating this doctrine. A firm of merchants, Haste & Quicke, had agreed to deliver goods at the warehouse of a firm of wholesale traders, Slowe & Shure, on a particular day, the time being agreed to be essential to the contract. On the delivery day Messrs. Haste & Quicke sent the goods to their customers' warehouse at about 5 in the afternoon. The carman found the warehouse closed. Now Messrs. Slowe & Shure generally closed at 6. The carman had no other course open to him but to return to his employers and report the facts. The next day the merchants received a letter stating that as the goods had not been delivered before the warehouse closed, the contract was cancelled. Messrs. Haste & Quicke promptly brought an action for damages for refusal to take the goods, and won, because it was by their opponents' own fault, in closing early, that the condition had not been fulfilled.

So that a condition will be annulled if the person under the obligation is prevented from carrying it out by the fault of the other side ; and this is one of the most important facts to be borne in mind when considering one's rights under such a condition.

I stated, at the beginning of this section, that after explaining something about Conditions in general, I should enter into a more detailed exposition of Conditions that are to be found in certain particular kinds of agreements. Of course, I must confine myself to those contracts in which the Condition is of paramount importance. The first of these contracts are—

**Building and Engineering Contracts.**—The kind of agreement here referred to is the kind especially called "Contracts" by the average man. I daresay you have often heard "contract" used in the sense that I mean—as when you speak of furniture removals "by contract," as distinguished from furniture removal "by time." When you talk about having the job done "by contract," you mean that the furniture remover undertakes to carry out the removal for a lump sum agreed on beforehand. In the other case, as there is no lump sum agreed upon, the remover is entitled to charge a reasonable amount ; and this he will generally arrive at by putting down the number of men, horses and vans employed, and the number of hours occupied in doing the work, and charging so much an hour for each man, and so much a day for each horse and van. This he does under a contract—if not, he would not be entitled to charge for it ; but somehow people always speak of removal "by contract" as applicable solely to a contract for a lump sum.

Now there are, as you know, men who make it their business to undertake the erection of buildings, the construction of all sorts of work, such as laying railway lines, cutting canals, and so on, for a lump sum. These men are generally called contractors—railway contractors, building contractors, and the like. Under this heading I shall confine myself to such conditions as are usually inserted in building and the more common engineering contracts. I shall call the person for whom the work is being done “the employer.”

Let us take, first, an ordinary contract for the building of a house. The way the thing is done is as follows: You wish to build a house of your own, and having purchased or leased a piece of land, you interview an architect, and tell him what sort of a building you want—so many bedrooms, a large kitchen, dining-room and drawing-room on the same floor or on different floors, and all the rest of your requirements. You also tell him, and this is most important, how much money you are prepared to spend. The architect then prepares a plan to meet your wishes, and your next business is to engage a builder. You may entrust the whole construction of the house to that builder, or you may give the building work to him and make a separate contract with a carpenter and joiner for the woodwork.

The builder's contract generally runs in this kind of form:—

(1) You undertake to employ the builder to construct, and the builder undertakes to construct, a house according to the plan prepared by the architect.

(2) The price is to be £1,000.

(3) The bricks and stone used are to be of a certain quality.

(4) The work is to be finished before a certain date. (*Warranty, not condition.*)

(5) You are to pay £100 when the foundations have been laid; £200 when the outside walls are built; £100 when the roof is completed; and the balance when the house is finished.

(6) No extra work is to be done without a certificate signed by the architect. (*This is a condition.*)

(7) No payment is to be made without the production by the builder of a certificate signed by the architect. (*This is a condition.*)

Before discussing the effect of the two conditions, let me give you a piece of practical advice. If you make up your mind to build, and are prepared to spend, say, £1,500, do not make a contract with the builder for that sum, because you will find there are invariably “extras” amounting to a considerable figure. I have known of cases where the extras mounted up to almost the contract price, and I have heard of instances where they even came to more. So that if you are prepared to lay out £1,500, make your contract for £1,000 or £1,100, and be careful to tell your architect not to allow more than £400 or £500 worth of extras to be done without consulting you.

Now for the Conditions. The first is that no extras are to be allowed if done without a previous written certificate signed by the architect. The second is that no payment is to be made without a written certificate, signed by the architect, that the work has been done to his satisfaction. What is the result of these conditions? The question has been asked over and over again, and has been fought in the Courts as often, perhaps, as any point possible to name. And



it has always been decided that the result is to place the builder absolutely at the mercy of the architect, provided that the architect does not act fraudulently. Take this instance. The builder finds some work, not included in the contract, to be necessary at a particular point. As this is an extra, he must obtain the written certificate of the architect before putting the work in hand. Suppose he does not. Suppose he cannot find the architect when he goes to look for him, and thinking that it will be all right, proceeds with the extra without the necessary consent. He does it entirely at his own risk, and the employer is not bound to pay for the extra.

Again, when the work has been finished, the architect refuses a certificate. The builder asks for reasons, and the architect refuses to give any. What is the builder to do? He cannot bring an action for the contract price against the employer, because he has bound himself by the condition relating to the certificate. Over and over again have builders, in these circumstances, brought actions against the employer for the balance due; and over and over again they have failed. The case for the builder is: "I have completed the work according to contract. You (the employer) get the benefit of my labour. I challenge anyone to say that the job has not been well done." And the answer always is: "Yes, we will admit that, but you are not entitled to be paid without the architect's certificate, and his certificate you are unable to show." This answer sounds very like that of Shylock—"I would have the bond." Nevertheless, it is an absolutely conclusive reply to the builder's claim. No matter how wrongfully or foolishly the architect may act in refusing to grant his certificate, until it is granted, the builder cannot recover a sixpence of the money he has earned. In fact, until the certificate is given, there is no money due, because "'tis so nominated in the bond."

But to this rule there are two exceptions. The first is where the employer prevents the architect from giving the certificate. As, for instance, where the employer goes into possession of the house as soon as finished, and refuses to allow the architect to enter and inspect the work. The second is where the architect and the employer fraudulently conspire to defraud the builder by withholding the certificate. This, I am afraid, happens not infrequently, but it is always most difficult to prove. It is not enough to be able to show that the architect has no reason for refusing to do his duty, but the builder will have to prove the existence of some understanding or agreement between the architect and the employer, entered into for the purpose of fraud. Every lawyer knows how difficult it is to establish a case of fraudulent collusion: one reason being that the accusation is a very grave one, amounting almost to a crime; and the graver the charge, the stricter and more conclusive the evidence must be. It is very rare, therefore, to find a case in which a lawyer is able to advise a builder to sue for his money without a certificate, on the ground of fraud. Still more rarely does the builder succeed.

Sometimes, in addition to making the architect's certificate a condition of payment, it is agreed that such certificate shall be final. When this is added the enforcement of the contract is more than ever in the hands of the architect, who can, practically, give any certificate he pleases, provided that it is not fraudulent, and that it relates to the matters upon which it was intended that he should certify.

Note the last clause, because an architect sometimes introduces into his certificate matters which do not concern him. Sometimes, for example, there is an agreement that if the work is not done up to date, the builder shall forfeit £5 a week for every week he is behind time. Now, unless the contract specially says so, the architect has nothing to do with this clause, because, on the face of it, he is employed as a skilled man to protect the employer from inferior material and bad workmanship. But you do not want an architect to tell you whether or no the builder is a week late. If, therefore, the architect has included in his certificate anything which has nothing to do with him, the certificate is bad, and the builder must obtain a fresh one.

Suppose the architect refuses to give a certificate at all—what then? In the first place, as I have said before, the builder cannot “go for” the employer (except as on p. 380), but he may be able to fix his claws in the architect. First, suppose the certificate is withheld out of spite, or from some other corrupt or fraudulent motive—for instance, the architect says, “I will not give you a certificate unless you pay me £50,” which is demanding a bribe—the builder can sue the architect for the full amount of what the certificate ought to be. He does not sue for so much for work done, but for the same amount as damages for fraudulently refusing to do a duty. So far, so good. The case does not present very much difficulty.

But matters become rather more complicated when the builder is only able to prove that the certificate is withheld—omitting the word *fraudulently*. He cannot sue for damages then, because there is no fraud. His only remedy is to ask the judge to order the architect to give a certificate, and even then the judge cannot interfere if the architect gives a certificate which is merely foolish and unreasonable.

Suppose, for instance, a tiled hearth has been ordered to be put in, instead of a stone one, as specified in the contract. That is an extra, and the builder is entitled to an allowance for it, because the tiles will cost far more than a common hearth-stone, and the laying of them will take much longer. The architect in his certificate allows half-a-crown for this extra—a foolishly small sum. Yet the builder has no remedy, unless, as I have said, he can prove fraud.

In fact, the position of the builder, under a contract of this kind, is so bad that I have often wondered how any man can allow himself to sign such an agreement. The architect is invariably paid by the employer and considers the employer's interests first and foremost, and yet the builder puts the whole of his remuneration into his hands. Strange as it may seem, however, the Architect's Certificate Condition is almost invariably found in building contracts. For my part, I have never known it omitted.

Sometimes, in addition to the certificate clause, these contracts contain a peculiar kind of arbitration clause, by which the architect is appointed arbitrator. This clause generally runs as follows, or to the same effect:—

“If any dispute shall arise under this contract between the employer and the builder, the same shall be referred to the arbitration of the architect, whose decision shall be final.”

In such a case as this, complications arise very often as to what matters come



within the certificate clause, and what within the arbitration clause. When the contract states, as it frequently does, that the architect's certificate shall be final, and the architect gives a certificate, neither party can claim to submit to arbitration anything included in the certificate. The reason is plain, being that by the contract itself the certificate was to be final. Where does the arbitration clause come in, then? The answer is that it applies when a dispute has arisen, because an arbitrator, like a judge, is only called upon to act when differences have arisen. Now, as to the matters included in the certificate, no dispute can arise, because the provision that the certificate shall be final is meant to prevent disputes. You cannot have a dispute concerning a finality. But the architect cannot include in his certificate any matters upon which a dispute has arisen; because those disputes give him power to act as arbitrator—that is, settler of disputes; and the clause for the prevention of disputes cannot possibly apply after disputes exist. The obvious reason is that you cannot prevent what has already happened. The architect may also be called upon to arbitrate upon matters that have been omitted from the certificate, and also in respect of things as to which he has no power to certify. For instance, he has no power to certify that because the builder did not finish the job before the agreed date, he must pay so much damages for breach of contract. But if the builder is late, and you, the employer, wish to claim damages on that account, and the builder refuses to pay, or you cannot agree how much he is to pay, either of you can refer the matter to the architect as arbitrator. One caution I would here give to architects with reference to these arbitration clauses. An arbitrator cannot act unless the matter is properly referred to him. That is, a dispute must have arisen; one of the parties must have told the other that he has communicated the fact to the architect, and the fact must have been communicated to that gentleman. This caution is not a vain one; for architects frequently make what they call awards under arbitration clauses without being asked. An arbitrator has no more right to interfere in this way than one of her Majesty's judges would have to give a judgment in a dispute about which no action had been begun.

One practical thing let me observe. It is this: For my own part I would never, were I builder or employer, agree to constitute the architect arbitrator in all disputes. He is too much interested in the contract to be quite impartial, and an arbitrator is worth very little unless he approaches the dispute without either partiality or bias. Consent, if you like, to refer disputes to another architect, or to any other competent person; but be quite sure he is entirely unconnected with the parties to the agreement, and that he will approach the dispute judicially.

There is yet another thing to be said. When the architect acts as arbitrator he must hold an inquiry, and listen to everything that may be urged on either side. Too often he omits this, and decides the dispute according to his own previous knowledge of the matter. Again I say, he has no more right to do this than a judge would have to decide a case without hearing the plaintiff and the defendant.

**Commission Contracts.**—Commission is a way of payment of an agent by results, and generally an agreement to pay commission is in the form of a contract

to pay so much per cent. With these, the ordinary agent's contracts, I shall deal when I come to Agency (Chapter 3). But you sometimes find that instead of a percentage the agent agrees to take a lump sum, and in this connection the law relating to Conditions has to be considered.

Thus, you have a plot of land to sell, and you put it in the hands of an estate agent (or factor), under such an agreement as this:—

"If Mr. Estagent finds a purchaser for the plot of land in Black Street, belonging to Mr. George Empler, at a price of £125, Mr. Estagent is to have £5 commission."

Now this contract may have several meanings. I mean that the parties may have intended one of several things.

(1) They may have meant that in no event should Estagent receive his commission unless he finds someone who actually *agrees* to buy the land at the price of, and *pays*, £125.

(2) They may have meant that if Estagent procures an eligible purchaser who signs a contract to buy at £125, he is to have his commission, though the sale actually goes off afterwards owing to a disagreement, or for some other reason. By "eligible" purchaser, I mean someone who is in a position to pay according to his contract.

(3) They may have meant that the commission should be payable if Estagent procures a man who agrees to buy, and is accepted by Empler, though the contract may afterwards be broken and the money be not paid.

Not unfrequently, after a broker has procured a purchaser at the price named, the transaction is never completed. The buyer and seller fall out about some point or other, and the property is never transferred; or, if it is transferred, the price is reduced. For instance, after Estagent has induced the intending purchaser to sign a contract to buy at £125, some question may crop up as to the title to the land—there is some legal doubt, in fact, whether Empler can legally transfer the property. For instance, Empler may have had the land left by his father's will in this way: "I give my land to my son Thomas, but if he dies before me, then it is to go to my son George." Thomas has disappeared, and as he does not come forward to claim the estate, George takes it, and is now trying to sell it. After the contract for sale has been duly signed, the solicitor for the purchaser asks what title (*i.e.* right) Mr. George Empler has to sell the land. This is important, because the seller cannot give the buyer a better right than he has himself. The father's will is produced, and the buyer wants to know when Thomas died, and is told that Thomas disappeared and could not be found, but that no legal proof of his death exists. You see, if he bought, and Thomas turned up one fine morning, the result would be that he (Thomas) would take his inheritance. Naturally, the purchaser refuses to go on, or else he says to George, "This is a risky bargain. You can take your choice of having it cancelled, or of accepting £70 for your land." George cancels.

Then the question arises, is Mr. Estagent entitled to his £5 commission? He very naturally claims that he is, because, he says, "I knew nothing about your bad title. I procured you a purchaser at £125, who signed a contract to buy, and whom you accepted. It is nothing to me what took place afterwards



between you two." Mr. Empler, on the other hand, insists that no commission is due unless the purchase is actually completed. He says, "You did not find me a man who purchased at £125; therefore your remuneration never became due." To put the matter in lawyerly language, Empler insists that an actual purchase by the person introduced is a Condition upon which commission depends. The point is a fine one, and quite open to argument; but the judge's decision will depend on the answer to the question, "What did Empler and Estagent mean by their contract when they made it?" And if the contract is in writing, they will be supposed to have expressed their intention in that writing; nor will either of them be allowed to go into the witness-box and explain that when he wrote those words he meant so-and-so. It is the business of the witness to testify what the actual words of the contract were, and for the judge to decide what those words mean. Witnesses often think themselves hardly treated when, in giving evidence as to a verbal contract, the lawyer on the other side persists in asking for the exact words, and declines to take for an answer, "He said something to this effect——" In the contract which I have given as an example, the legal construction is in favour of Estagent; for the words, "find a purchaser at the price of £125," are held to mean that if Estagent finds an eligible person who signs a contract to buy for £125, he has done the whole of his duty, and has therefore earned his commission.

But the case may very easily be altered. The intending purchaser may have signed a contract to purchase, containing the following clause: "If the purchaser shall make any objection to title, which Empler is unable to remove, Empler shall have the right to rescind the contract." This clause is an exceedingly common one in contracts for the sale of land. Its effect on the agent's commission is considerable; for should the purchaser take such an objection as I have stated, with the result either that the sale goes off altogether, or that the price is reduced to less than £125, no commission can be claimed. Why? Because this shows that the contract to pay commission was conditional on the event of Empler being able to show a good title to the land, or else to obtain £125 for it with his bad title.

It is very easy to word one of these commission contracts so that a dispute may arise of the kind explained above. And the moral is—Make your contract plain. It is easy enough. If you intend not to pay any commission unless the purchase is gone through with, and the price named is actually paid, say so. For, as a rule, the agent will be entitled to his remuneration if he simply introduces an eligible person who agrees to give the price. You should, therefore, annex to your contract with the agent some words like these: "It is hereby agreed that if any purchaser introduced by the agent declines to carry out the contract, or raises objections which the seller is unable to meet, then the commission shall not become due." If you do not insert such words, you are very likely to find yourself liable to pay commission on a sum that you never received.

Such a case was *Horford v. Wilson*. Wilson promised to pay Horford £5 if he would procure a tenant for certain premises and get him £350 for his lease. Horford procured a man named Stevens whom Wilson agreed to accept as tenant, and who entered into a contract to pay £350 for the lease. It turned out

# LEGAL FLASH-LIGHTS

## FOR EVERY-DAY USE.

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IGNORANCE of the law excuseth no man.

TRESPASSERS cannot be prosecuted unless they do wilful damage.

A MISTRESS has no right to examine her servant's box.

A MISTRESS can give notice any day.

A SERVANT can give warning any day.

THE death of the master discharges all his servants and employees.

DEATH of the master breaks an apprentice's indenture.

YOU are liable as a partner if you act like one.

LANDLORDS are not bound to repair unless they have agreed to.

TENANTS are not bound to repair unless they have agreed to.

A YEARLY tenant must give six months' notice, ending at the date he took the house.

YOU may be a yearly tenant though you pay rent quarterly.

INSURE when young.

MUTUAL life assurance gives the best returns.

NON-MUTUAL life assurance gives the best security.

INVEST in any life assurance office with a big reserve.

ENGLISH wives have no right to pledge their husbands' credit.

SCOTS wives may pledge their husbands' credit for household things.

MAKE your Will as soon as you are married.

MARRIAGE cancels a previous Will.

A SECOND Will does not necessarily cancel the first.

EXECUTORS and Trustees must generally sell everything and invest the proceeds in authorised investments.

RAILWAY Companies are bound to carry all the goods they have room for.

IF you do not pay your railway fare, you cannot be arrested if you offer your name and address.

SEASON-TICKET-HOLDERS have no remedy if trains are late.

THE passenger in the corner facing the engine controls the window.

A TOWN Council or Railway Company's Bye-law is bad if unreasonable.

BARGAINS about land or houses must be in writing.

MORE than 12 pence in copper is not a legal tender.

MORE than 40 shillings in silver is not a legal tender.

NEVER treat an unjust claim with silent contempt.

A CREDITOR need not ask for his money.

NO one is bound to accept payment of a debt except in coin and Bank of England notes.

AN Agent's authority can be cancelled at any moment.

SCOTTISH and English commercial law are practically the same.

UNDISCHARGED bankrupts may not get £20 worth of credit without notice.

YOU may not poison your neighbour's cat.

CONTINUOUS noise next door is a nuisance.

A NUISANCE in one place may not be a nuisance in another.

THE Householder is always responsible to passers-by for the safe condition of his premises.

A RIGHT of Light is gained by 20 years' enjoyment.

TRESPASSING Animals may be captured and detained till the damage is paid for.

THE landlord of an unfurnished house does not warrant that it is fit to live in when he lets it.

AN English lease or agreement of tenancy for over three years must be in writing.

A SCOTTISH lease for over one year must be in writing.





afterwards that Stevens lacked the necessary funds, and in consequence the proposed tenancy fell through ; but Wilson, no doubt to his great surprise, had to pay Horford's commission. This was because he had accepted him, and made a contract with him. If the commission agreement had contained a clause such as I have suggested, it would have saved the trouble and expense of an action, besides assuring Wilson that he would not have to pay for services from which he derived no benefit.

At the risk of reiteration, let me say that in accordance with the general principle laid down on page 380, if the purchase, or letting, or whatever it may be, goes off by the fault of the employer, he will always be bound to pay commission, even if there was a condition that the agent was to get nothing unless his employer actually received the money from the person introduced. For it would be unreasonable to deprive the agent of his payment if he were prevented from earning it by his employer's fault. Of course, it is possible to make a commission contract on the terms that "if the purchase shall not be completed *from any cause whatever*, no commission shall be due." I have known of one case of the kind ; and in that case it was my duty to inform the agent that he could recover nothing for his trouble, though the business had failed to come to a satisfactory termination entirely through the folly of his employer.

**Arbitration clauses.**—It is common nowadays for merchants and traders and other business men to introduce into their contracts a clause providing that all disputes under the contract shall be referred to arbitration. The object undoubtedly is to avoid the necessity of going to law. The history of arbitration clauses in England is peculiar. At one time, they were illegal, because, as it was said, they were meant to "oust the jurisdiction of the Courts." It was held to be every man's right to ask the courts of law to decide all questions affecting his legal rights, and one could no more barter away that right in the case of disputes on contracts than he could in disputes affecting his liberty. That is to say, just as it would have been (and is now) of no effect for anyone to agree to go to prison without trial by one of her Majesty's judges, so it was of no effect for him to agree to forego his right to have his contractual liabilities decided by the ordinary tribunal. This law was not peculiar to England, for it was in force in many European countries, and in Holland it obtains to this day. But it was repealed in England in the year 1854 by the Common Law Procedure Act.

Until recently, arbitration clauses were, no doubt, very beneficial to business men, because arbitration was, as a rule, much quicker, and usually much cheaper than a lawsuit. I very much question, however, whether much is gained nowadays, in England (though it is different in Scotland), by agreeing to refer all disputes arising on a mercantile contract to arbitration instead of to law. For owing to the action of Mr. Justice Mathew, commercial disputes can be, and are, decided in the Commercial Court of the High Court of Justice with the maximum of speed and the minimum of expense. That eminent judge founded a special Court for business men, to try commercial cases only. In that Court it is the exception, rather than the rule, for a case to remain undecided six weeks after the writ is first issued. I have known a dispute to arise one week, a writ to be taken out the next, and the trial to take place a fortnight afterwards. That learned judge also did



away with those interminable and costly proceedings that used at once to delay the decision of the case and to heap up costs and expenses against the litigants. In fact, I make bold to say that the trial of a commercial dispute in the Commercial Court is far more speedy than any arbitration. And it is, as a rule, quite as cheap, and generally cheaper. For one thing, when you have an arbitration you usually have as judges two arbitrators and an umpire, all three of whom have to be paid by the litigants. In the Commercial Court the judge is paid by the country. Again, in that Court you have the advantage of a judicial mind well trained in the weighing of evidence, and well versed in commercial law and business practices. For the Commercial Court judges have hitherto been selected—and it is, I believe, the intention that they always shall be selected—especially from those men on the Bench who have special business knowledge. As to appeals, I know that is one of the great bugbears of business men. They say, “The worst of it is, that even if you win your case the first time, your opponent has the right to go from one Court to another, right up to the House of Lords, which implies a lot of worry, delay, trouble, and expense before the thing is finally settled.” Let me say that it is quite in the power of the contending parties to obviate this risk. They have only to agree, when the case begins, that neither of them will appeal. Such an agreement is binding, and after it no appeal is possible. In fact, the only advantage, as far as I know, that arbitration possesses over an action in the Commercial Court is, that the parties to a proceeding of the former kind secure privacy, while the trial of an action is, at present, necessarily public. I live in hopes, however, that before long it may be possible to secure private trials of business disputes, because I have known of more than one instance where a man has suffered a wrong rather than submit to a public cross-examination through which his affairs would be revealed to all the world.

But I did not introduce the subject of arbitration into this chapter and in this place merely to descant on its merits as compared with a trial before the tribunal established by that great judge, Sir James Mathew. I introduced the subject here because a clause in an agreement to submit disputes to arbitration is a condition. And it is a condition of such a nature that it bars all right to take action in a Court. In other words, after you have agreed to submit to arbitration, you cannot, in any circumstances, ask the Courts to decide a disputed point.

An agreement for arbitration is technically called “a submission,” because we always speak of “submitting” to arbitration—no doubt, because it is quite a voluntary arrangement, and not, like a lawsuit, a matter of right. The law governing arbitrations is to be found in the Arbitration Act of 1889. By that Statute, every submission to arbitration must be in writing. Unless the parties choose otherwise, the arbitration is to be at the hands of one arbitrator only. But if they do specially provide for it, they *may* have one appointed by each party. In that case, the *modus operandi* is as follows: When a dispute arises, one of the parties must give notice to the other, in writing, stating what the matter in dispute is, and that he calls upon the other to name his arbitrator. He, at the same time, names someone to act on his behalf.

Then the other party to the contract must appoint a person to act for him. I say “*must*” appoint, because it practically comes to that. For if the

second arbitrator be not appointed within the proper time, the first man officiates by himself. So that when you have an arbitration agreement with Blank, and he refuses to name an arbitrator on his side, never mind. You nominate yours, and Blank will have to abide by your man's decision. Suppose, however, no little unpleasantness of this kind occurs to mar the harmony of the proceedings, and you each name your man. Well, a Court consisting of two members is always dangerous, because one may take one view, and the other another. When two of her Majesty's judges are sitting together to try a case, and they find themselves unable to come to a unanimous conclusion, there is a way out of it—the opinion of the senior judge prevails, except on appeals. I mean senior as to the date when he was made a judge. But no such rule could apply to arbitrators, because they are only amateurs, sitting judicially merely *pro tempore*. To prevent the whole affair from becoming an impotent farce, the Arbitration Act provides that the arbitrators shall nominate a third man, called the "umpire," who arbitrates upon the arbitrators. To put it another way, the umpire only interferes to prevent a deadlock. He has a casting vote.

Just let me make one remark as to the form of an agreement for arbitration. I have seen, not seldom, very elaborate clauses of this kind, in which it is fully set out that each party is to appoint one arbitrator, and these two together shall appoint an umpire, and all the rest of it. There is not the least need for all this. The simplest and best clause is the following:—

"All disputes arising under or in connection with this agreement shall be referred to arbitration in the manner provided by the Arbitration Act, 1889."

This suffices, when you intend to have one arbitrator. When you intend to have two, the clause should say, "referred to the arbitration of two arbitrators, one to be appointed by each party."

**Who is competent to be an arbitrator?** I think it necessary to answer this question, because some people have such very strange ideas on the subject. They seem to think they ought to appoint someone who will "take it out of" their opponent—someone, that is, who will not in any circumstances give his award in favour of the other side. I am reminded of a story told of a North of England crowd at a cricket match, who vigorously hooted an umpire because he gave one of the home side out—unfairly, as the spectators imagined. At last one man called out, "Give us a fair umpire—one that's a bit partial to us." Now that is a very common notion of an arbitrator, "one that's a bit partial to us." One man, not very long ago, nominated himself to act as arbitrator! I need hardly say he was not allowed to act, for the other party applied to the Courts to have the nomination set aside, and succeeded. Another trick is to nominate someone notoriously *hostile* to your opponent. This will not do either. Neither is it legal to appoint one who has an *interest* in deciding the case in your favour—I mean a pecuniary interest. Nor, again, are you at liberty to nominate one who has already expressed an opinion on the matter in dispute. After this much on the subject of whom not to appoint, let me say whom you ought to nominate. The arbitrator ought to be someone who is, as far as can be known, quite impartial; and the reason will at once be seen when we consider the duties of an arbitrator, which are, in two words, to act judicially.



As soon as the first arbitrator is appointed, he should try to ascertain the name and address of his colleague; and when he has ascertained this, the two should meet and nominate the umpire, who must, of course, be asked if he will act in that capacity. Then a day must be appointed by the arbitrators and umpire for the hearing of the cause; and due notice must be sent, as early as possible, to each of the contending parties, so as to give him time to prepare his evidence. When the day of the hearing arrives, each side must be required to produce all its evidence and to cross-examine the other side's witnesses; because it is the duty of the arbitrators to decide according to the evidence. That is only another way of saying what I stated before, namely, that they must act judicially. What would one think of a judge who said, "I decline to hear witnesses or lawyers on either side. I am not going to trouble about points of law. I shall investigate the matter myself, and decide according to my own judgment"? Arbitrators have been known to do such things, and then have been surprised when the loser has applied to a court of law to have the award set aside.

Negatively, to act judicially means to act without partiality or favour. It is a common thing for the arbitrators to take sides, each acting to all intents and purposes as advocate for the person who appointed him, leaving the really judicial work entirely to the umpire. Now this is wrong, for anyone can see that such conduct is not judicial.

After the hearing of the dispute, the arbitrators (and umpire, if he was called in) give their decision, which is called the Award. By the Act above mentioned, all awards must be in writing, signed by the arbitrator or arbitrators.

**Miscellaneous provisions.**—(1) When an arbitrator misconducts himself the Court may remove him, upon application by either of the disputants. Misconduct means unjudicial conduct. For instance, there was the case of A B, who was appointed one of the arbitrators to decide on a disputed fire insurance claim. A B was appointed by the policy-holder, the fire insurance office appointed another, and these two appointed an umpire. The arbitrators being unable to agree, the umpire awarded £1,200 to the holder of the policy. Afterwards it was discovered that the said policy-holder had assigned his claim under the policy to A B. The office applied to the Court to set the award aside, and were successful. It was absurd for A B to pretend to arbitrate when he was to put into his own pocket the amount awarded.

(2) It often happens that people agree to refer matters in dispute to the decision of a single arbitrator; but when it comes to the point, they are unable to agree upon their man. Here, but for a timely clause in the Arbitration Act, proceedings would come to a standstill; but that Statute enables either party to apply to the Court to appoint someone. The judge will generally nominate an experienced barrister, unless both parties are agreed that they want a particular kind of man. Thus, they may be agreed that they will submit to the arbitrament of a civil engineer, but are unable to fix on any particular gentleman who commands the confidence of both of them. In that case, the Court would appoint an engineer to adjudicate. It is, however, a useless expense to apply to a court of law to name an arbitrator. If you cannot settle it in any other way, throw half-a-dozen names into a hat and agree to abide by the result of the draw.

(3) If an umpire or arbitrator refuses to act, and the parties or arbitrators do not supply the vacancy, any party to the arbitration may serve a notice, in writing, demanding the appointment of a person to fill the vacant post. And if no one is nominated within seven days, application may be made to the Court to fill the vacancy. The same thing happens if an arbitrator refuses to act, or dies, or becomes incapable of doing his duty. The arbitrators must make their award within three months after entering on the reference. They may, however, extend the time, but only by mutual agreement, expressed in writing signed by both of them. Such an agreement for an extension of time must be signed before the original three months have expired. Thus, if arbitrators began their functions on the 1st of June, the award must be given before the 1st of September; but it will be legal for them to make a written agreement at any time before the 1st of September, extending the period. Should they allow the last day of August to expire without either issuing the award or signing such an agreement for extension, they will have to invoke the aid of the Court in order to have the time extended.

(4) When an arbitrator has made his award, he is, as lawyers say, *functus officio*—that is, he has discharged his duty. It is necessary to say this, because arbitrators, after they have made their awards, frequently come to the conclusion that they have decided wrong. And they want to recall the adjudication and alter it. But it cannot be done: not because the law loves wrong decisions, but because if you allowed this kind of thing you would never know the end of it. You would have no finality. At the same time, an arbitrator can, if he has made a clerical error in his award, call it back and alter it. Suppose, for instance, he meant to award £2,000, and by mistake he put down £200, he could rectify the mistake. But after putting down £2,000, which he meant to put down, he cannot reconsider the matter. In other words, he may correct an unintentional mistake, but he may not revise his judgment and alter the substance of it.

(5) Finally, on points of law an arbitrator is open to correction by the Courts. If a point of law arises in the course of the reference, he ought either to adjourn the case until the parties have taken the decision of the Court upon the law, or else decide the matter subject to the decision of the Court. Take the case, for instance, of the Metropolitan Tramways Arbitration. The London County Council proposed to take over compulsorily the undertaking of the Tramway Company, and the price was left to arbitration. The arbitrator was asked by the Council to assess the price on the basis of the amount it would cost to put down the rails, and to erect the company's terminal stations, and so on, deducting an amount for depreciation through time. The company contended that he ought to take as a basis the value of the company as a commercial undertaking—that is, not to consider the cost price of the line, etc., but their value as a profit-making concern. So the arbitrator made, I believe, two valuations, one on each basis; and then stated his reasons for doing so, and took the opinion of the Court as to which was the true one in law. In the end the view of the County Council prevailed. I quote this case to show how points of law arise in arbitration, and how they are decided. I may remark that when the arbitrator is not a lawyer,



the parties frequently agree to appoint what is called a "legal assessor," who has nothing to do with the facts of the case, but is only asked to decide such legal points as may arise in the course of the proceedings. If an arbitrator decides a point of law himself, and one of the parties thinks he is wrong, that party should ask the arbitrator to "state a case"—which means that the arbitrator should state, in writing, what the point of law was, and how he decided it. Then the one who thinks himself aggrieved has to bring the matter before two judges of the High Court, who decide whether the arbitrator was right or wrong, and affirm or reverse his award accordingly. If the arbitrator refuses to "state a case," he may be compelled to do so by what is called a *mandamus* from the Court; provided the Court is convinced that a *bonâ fide* point has been raised.

**Conditions as to demand, notice, approval, mutual performance, valuation.**—A promise may be conditional upon *demand*, and it is not then performable until the demand has been made. It is thus important to consider what promises require a demand to be made before the promiser can be called on to fulfil them. On the principle that the agreement of the parties governs all matters relating to a contract, whenever you expressly stipulate that you shall not pay the money or do the act as promised until demand is made, this is a Condition. Thus, if you give a bill of exchange payable "so many days after demand," you cannot be called on to pay until a demand has been made and the days have elapsed.

As a rule, unless it be so expressly agreed, when you have promised to do a thing, you are bound to do it without demand. Take this case, for instance: You have ordered groceries from a shop, and have received the goods, but no bill or invoice to say what the price is. You are liable to have an action brought against you for the value of the groceries at any moment. I have heard people in various Courts say, not infrequently, "No bill was ever sent in, and no demand for payment has ever been made." Now, although every courteous creditor will ask for his money before he puts his debtor in the Court for it, yet this is a matter of courtesy only. For, as one of our great judges plainly put it, "a request for the payment of a debt is quite immaterial, unless the parties to the contract have stipulated that it shall be made; if they have not, the law requires no notice or request, but the debtor is bound to find out the creditor and pay him the debt when due."

There is one case, however, in which a demand is necessary before an action can be brought, and that is in the case of agency. If you have an agent who has money of yours in his hands—such as a commercial traveller, from customers—you cannot sue him for that money until you have demanded it. The reason is that it is an agent's duty to account for his principal's money on request. The same thing applies to any kind of property in the hands of an agent; the principal cannot bring an action against him for detaining it until the return of the property has been demanded. But if you find that your agent has been dealing with your property as if it were his own, you can sue him straightway for converting the thing to his own use.

What I have said about promises being generally performable without demand, applies also to notice; for the general rule is that when you contract to do a

certain specific thing in a certain event, you must find out for yourself whether that event has happened, and you cannot plead, if an action is brought against you, that you have received no notice of the happening of the event. To show how far this doctrine extends, we have only to look at an old marine insurance case. Mr. Dawson insured his ship against loss at sea with Mr. Wrench. The good ship went down, and Dawson, as soon as he heard of it, brought an action for the amount of his loss. "But," said Mr. Wrench, "you ought to have given me notice of the loss. How was I to know that the ship had sunk unless you told me? You had no right to bring your action until you had given me an opportunity of paying." But the judge held this to be unsound in law, because the loss of a ship by perils of the sea was a fact just as much within the knowledge of Mr. Wrench as of Mr. Dawson. It might be inconvenient, his lordship remarked, to the underwriter, but if he wanted notice, he should have bargained for it when he made the contract.

In fire insurance policies, there is generally a condition that the insured shall, within a certain number of days or weeks, give notice of any loss. If you have, as I hope you have, insured your household goods against loss or damage by fire, look in your policy, and see if it contains such a condition. If it does, remember that you must be careful to observe that condition strictly. If your notice of loss is sent a day late, you lose your right to compensation under the policy.

I have said above that as a rule no notice is required, but to this there is an exception, as, indeed, reason requires. For if you promise to do something for Alias if such and such an event happens, and Alias is the only man likely to know whether it happens or not, he must give you notice if it does happen. A good instance of this will be found on page 157, with reference to an agreement to repair a house. If the tenant agrees to repair, he is bound to do it without notice from the landlord; but if the landlord covenants to repair, he is not liable until the tenant gives him notice of the particular dilapidation.

Take warning, and do not try to carry this exception too far. If you ought to be able to find out for yourself, you must find out, and cannot claim notice. Suppose you have, in a weak moment, guaranteed the repayment of a sum of money borrowed by your friend Dashaway from Messrs. Shye, Locke & Co. If Dashaway does not repay the loan on the very day it is due, the lenders can bring an action against you first thing the next morning. In vain will you declare that you had no notice of Dashaway's failure, because Messrs. Shye, Locke & Co. were not bound to give you any warning. You were quite able to find out, if you had taken the trouble, the fact of the debtor's default. The moral is to agree, when you become surety, that you shall not be called upon to pay until so many days after notice. I myself would never undertake such a responsibility without that protective clause.

As to contracts conditional on **approval**, you will find one or two examples in the previous pages. One hears sometimes of contracts like this: "I take your pony and if I like her, I'll give you £10 for her." This promise is worth nothing in law, because you cannot say that a man is bound subject to his own approval. It is like saying, "I'll take your pony to try, and buy her



afterwards for £10 if it suits me to do so," which is plainly not binding, because it does not contain the intention to create legal relations of which we have spoken on pages 275 *et seq.* The point is, that a promise conditional on the approval of the promiser himself is not a legal promise at all. But one knows how common it is for people to take things on trial before buying them, nor do I intend you to understand that such agreements are not binding. The only thing is, they must be made properly. It must not be, "I will take this pony on trial, and if I like him I'll give £10 for him." It should be, "I'll take the pony on trial *for a week* [or some specified time], and if I don't return him in that time I shall keep him for £10." Here, by tying the promiser down to a time, you remove the vagueness and uncertainty incident to the first agreement.

It is, however, a common thing to make a promise conditional upon the approval of some stranger to the contract—as in the case of *Pym v. Campbell* on page 334, where the promise to buy the patent was conditional on the approval of Abernethy, the engineer—and such conditions are quite valid. This holds good also in the case of building work to be approved by an architect or engineer.

Perhaps the commonest condition of all is the condition of **mutual performance**, though most of you, I daresay, will not recognise it under that name. You will know it better when I give you the usual instance, "Cash on delivery." When you buy goods, not on any agreed terms of credit, you make a contract subject to a condition of mutual performance. You must pay on delivery; the tradesman must deliver on payment. The performance by you of your promise [to pay] is conditional on his performing his promise [to deliver the goods], and his promise to deliver is conditional on your promise to pay.

**Valuation** is often a condition of a contract—and a very important one. Especially in buying land, or large quantities of goods, the buyer frequently agrees to buy, and the seller to sell, at the price fixed by valuation. Let us consider the two chief kinds of valuation agreements that give rise to controversy :—

(1) "George Gordy agrees to sell and Thomas Titmarch agrees to buy the Home Farm, in the parish of Bigham-under-the-Hill, at a price to be fixed by the valuation of Mr. William Woffles, Auctioneer and Surveyor."

(2) "George Gordy agrees to sell and Thomas Titmarch agrees to buy the Home Farm, in the parish of Bigham-under-the-Hill, at a fair valuation."

Both these forms are objectionable, though in common use; and I will tell you why they are objectionable. In the first case, suppose Woffles, on being asked to make a valuation, refused, or demanded such a big fee that you could not afford to pay it; or suppose he died before he could fix the price. You would be in an awkward fix, because neither of you can compel the other to accept the valuation of anyone else. You have made Woffles's valuation, and Woffles's only, a condition of the sale, and as I said on p. 376, conditions are always interpreted with the utmost strictness. To prevent the contract from falling through by reason of the refusal or inability of Woffles to act as valuer, you ought to add to contract number one, "but if Mr. William Woffles shall refuse or be unable to act, the price shall be fixed by Mr. Benjamin Baker," or "by two valuers, one to be

chosen by each party." This guards against mishaps that might cause the contract to fall through by no fault of either party.

The second form of contract given above is objectionable on the ground of vagueness, but is not so liable to fall through as the first kind. It ought to be easy for two reasonable men to agree upon a "fair" method of valuation. If not, one of them may bring an action against the other for the performance of the agreement, and the Court will direct a valuation according to the judge's idea of fairness. I do not recommend either of these forms of agreement for sale at a valuation. The most workable form is the following :—

"A B agrees to sell and C D agrees to buy the Home Farm, with all crops, live stock, etc., thereon, at a valuation. In case the said A B and C D cannot within [3] days, agree upon a single valuer, each party shall name one valuer on or before the [6th] day of [June], and in case the two so appointed are unable to agree, they shall call in the assistance of a third valuer to act as umpire."

An agreement of this kind is safe, because it provides for all reasonably possible contingencies ; and that is, I take it, the difference between a well-made and an ill-made contract.

All these conditions about demand, notice, approval, mutual performance, and valuation, have to be strictly kept. Thus, if the liability to do or pay something is to be on demand, no liability arises until after demand. The same with regard to notice, mutual performance, and the rest. It becomes of the greatest importance, then, if you are the person to whom the promise is given, to be able to prove that you made the demand, or gave the notice, or received the approval, or were ready and willing to perform your part of the mutual contract, or gave facilities for the valuation. You ought, therefore, to have some evidence to show these things. Thus, if you have to give the other party notice in writing, you should take care to send the letter by hand, or else by registered post, and to keep a copy. The same applies to a demand. If you make the demand by letter, do not use the ordinary post. If you make it by word of mouth, be sure to have someone with you. And above all, if your right depends on somebody else's approval, be sure to stipulate that such approval shall be given within a particular time. If not, you may find yourself awkwardly placed. Just a last word, which is, that if it is the other party's fault that the condition has not been performed, you can sue him for breach of contract without regard to the condition. Suppose Richard Swiveller agrees to pay something to you after three days' notice, and you try to notify him, but are unable to do so because of the genial Dick's habit of vanishing when he sees you coming, the notice will be dispensed with, and you can demand payment forthwith by simply issuing a writ or a summons.



## SECTION VI.

## WHEN CONTRACTS ARE BROKEN, AND THE CONSEQUENCES THEREOF.

Contracts broken by failure to perform—By breach of a condition—By giving notice of intention not to perform—Taking "No" for an answer—Damages—History of damages—What damages are recoverable in general—Based on intention of the parties—Damages against carriers of goods—In building contracts—In agreements for sale of land—Title to land—Forfeiture of deposit—On agreements for leases—On contracts for work and labour—A caution—On contracts of hiring and service—Notice to different classes of servants—Specific performance of contracts—Confined to cases where damages are not an adequate remedy—Not granted where remedy worse than disease—Release of other party from his bargain—Delivery or payment by instalments.

CONTRACTS may be broken in a variety of ways. One is, of course, by not doing what you have promised to do. Another is by breaking a condition (*see* previous section). Another way is by giving notice to the other party that you do not intend to carry out your agreement. This point was decided in a case many years ago, where a Mr. De la Tour, intending to visit the Continent, engaged one Hochster to accompany him as courier, at £10 a month. The engagement was to commence on the 1st of June; but on the 1st of May, before the date fixed for the service to begin, Mr. De la Tour altered his mind, and gave notice to Hochster that his services would not be required. The courier at once brought an action for damages for breach of contract, and succeeded. It was argued for the master that Hochster ought to have waited until the 1st of June, and then have gone and proffered his services. If De la Tour had refused them when proffered, then was the time to bring the action, because, it was said, no performance being due until the 1st of June, there could be no breach of contract before that date.

A little consideration will show why this argument failed to convince the Court. Had it succeeded, see where it would lead us. Suppose you agree to marry a young lady on the 1st of August, and on the 1st of June you marry another, the original *fiancée* may bring her action for "breach" without waiting for the 1st of August. It is, of course, just on the cards that your wife may die and you be widower before the end of July, very much at the disposal of the first young lady; but the mere fact of marriage with one person is a breach of your engagement to marry another.

From the last illustration we may draw the inference that when you make it impossible to perform your share of the agreement, that is a breach, for which the other party may bring action or rescind the contract, without waiting for the time of performance. The instance of the man under engagement to marry Mary on the 1st of August, who marries Jane on the 1st of June, is a perfect illustration. You may also see an example in this case: You have agreed to deliver goods to Pecunias & Co. on the 20th of July. On the 10th of that month you learn that the firm has become insolvent. You are not bound to fulfil your share of the agreement, because they, by becoming bankrupt, have made it impossible for them to carry out their part—namely, to pay the price.

I have stated at the beginning of this section that if a person with whom

you have contracted notifies you of his intention not to go on with the agreement, you can take his word for it, consider the contract at an end, and sue him for breaking it. But it sometimes happens that instead of adopting this course, you try to reason with him, and to persuade him to go on. Let me say that if you do so, you do it at your own risk. Just before the outbreak of the Crimean War, an English shipowner had a contract with a Russian merchant to carry a cargo from Odessa to some port in Britain. When the vessel arrived at Odessa, the merchant point-blank refused to put the goods on board. The captain could have accepted this and sailed away, and then the shipowner would have had a good cause of action against the merchant. But the captain adopted no such course. He waited at Odessa, and sent messages requesting the merchant to proceed with lading. Then war was declared, after which it was impossible, because unlawful, for the contract to proceed (p. 305). On the declaration of peace, the Englishman tried to recover damages for breach of contract, alleging, what was perfectly true, that the Russian had definitely refused to go on. The answer to this, however, was, "You did not treat my refusal as a breach of agreement at the time. Your captain declined to accept my word, and treated the contract as still subsisting by demanding the loading of a cargo. You cannot now treat as a breach that which you refused to take at the time." And this answer was conclusive, and the Englishman lost his case.

The **consequences of a breach of contract** are sometimes single, sometimes double, and sometimes treble. I mean that if X has a contract with Y, and Y breaks that contract, X has sometimes one, sometimes two, and sometimes three remedies. The one he always has is an action for damages. He may also in certain cases be able to compel Y actually to perform the thing he agreed to do. This is called *Specific Performance*, because Y is ordered by the Court to carry out his contract specifically, instead of merely paying a sum of money to get out of it. The third remedy is that X may refuse to carry out his part of the bargain.

**Damages.**—The origin of the law by which one that has wronged another is compelled to pay the latter a sum of money, is lost in the haze of the bygone ages. Ancient codes contain evidence showing how different was the state of things in the former times. There is the well-known "an eye for an eye, a tooth for a tooth" of the Law of Israel; and the Law of the Twelve Tables (about 460 B.C.), the earliest known European compilation, regarded with almost superstitious veneration by the Roman people, proceeded on lines somewhat similar.

In a primitive state of society, before the rule of law and order has begun, the infliction of a wrong is usually followed by retribution, swift, sudden, and severe. But the vengeance often exceeds the injury, and life may easily be taken in retaliation for some petty wrong. With the growth of government comes the era depicted by the Mosaic Code—the "eye for an eye" period, which is merely the substitution of State-controlled vengeance for private revenge. The idea is still the same, namely, that the man wronged shall be able to injure his enemy in return; so he still takes a "tooth for a tooth," inflicts blow for blow; but he does it under the auspices of the State, and the State looks to it that he does not exact two teeth for one, or inflict a blow with a cudgel in return for one with the fist.



The next step is taken when the retaliatory punishment is inflicted not by the injured party, but by a public officer. Soon after this we approach the idea of pecuniary damages. If Titus gouged out the eye of Lucius, Lucius could claim the right to gouge out the eye of Titus, or to have it gouged out by the public executioner. What was there to prevent Titus redeeming his eye from vengeance by giving Lucius a certain number of his sheep or cattle? If Lucius consented to accept the payment, he had to forego his revenge. Another step is when the State or Government steps in and legalises this alternative—making it compulsory. So that if Titus, in the case above, offered a reasonable amount to Lucius, the latter would not be allowed to retaliate. The law was in this condition in Rome when the Twelve Tables were compiled, and in England down to the eleventh century after Christ. Both in Rome and in Britain there were regular tariffs by which one who had inflicted an injury might escape the vengeance of the injured man and his friends. In Rome, as in Britain, an eye was worth so many pieces of silver, an arm so many, an ear so many. Injury to the right eye was assessed higher than injury to the left. The right hand, the sword-wielder, was worth more than the left. A blow on the face cost the striker three times as much as one on the back.

In course of time it becomes more usual to accept the money, or its equivalent, than to insist on the infliction of vengeance; and from this it is only a short step to the law as it now stands, namely, that when one man has injured another, the former must pay to the latter a sum of money varying according to the amount of damage done, and to a variety of other circumstances, such as the manner in which the wrong was done—whether intentionally or merely by negligence. At the same time it becomes unlawful to retaliate in the old fashion, and we find one of the hardest duties of rulers in the Middle Ages was the enforcement of this comparatively new doctrine. In fact, it was not until the end of the sixteenth century that the British people realised that if A killed one of B's relations, B was not justified in killing A or one of his relations; but eventually the law asserted itself, and placed all punishment into the hands of the State.

Thus we see that damages are originally not compensation to the sufferer, but the price at which the aggressor buys off the sufferer's revenge. It is also a matter of historical fact, which follows from the preceding argument, that damages for breach of contract are historically later than damages for wrongs of personal violence or aggression. In fact, a breach of contract was not clearly distinguished in the old times from a positive wrong. A man who had bought and eaten my corn and had neglected to pay for it, was regarded in exactly the same light as he who had stolen the corn. We accordingly find, amongst ancient nations, that debtors who could not pay what they owed were treated practically as criminals.

In Rome, such a debtor was entirely at the mercy of the creditor. If Titus owed Lucius a sum of money and did not pay at the appointed time, Lucius first of all commenced an action. The proceedings began, not as now, by a polite interchange of letters between the respective solicitors, but by Lucius requesting Titus to come to the Court with him. If the latter refused, Lucius went again on

the next Court day accompanied by numerous friends, and in their presence he again summoned the debtor to come and have the case tried. This went on for three market-days, and if Titus still remained deaf to the voice of the charmer, Lucius was at liberty to seize him and drag him before the judge. Once arrived there, the case was tried after the primitive fashion of those days, and if judgment were given for the plaintiff (pursuer), the debtor was ordered to pay the money on a certain day. If he did not pay, whether from inability or otherwise, Lucius had him at his mercy. He could throw him into prison—not a State prison, but a private dungeon—and keep him there for several days loaded with chains. If no one came forward to pay the debt, the unfortunate debtor had to be exhibited in the market-place on three successive market-days, to see if anyone would take pity on him and find the means to set him free. How fervently the unfortunate wretch must have prayed that the gods would move the hearts of his old acquaintance to mercy, may be imagined when I tell you that if no one came forward to pay the debt, the debtor could be sold into slavery.

Such a tale sounds strange to modern ears, but in England it was not until 1869 that imprisonment for debt was abolished. Prior to that date hundreds of men had died in prison simply because they were unable to meet their engagements.

In discussing the question of damages, we must remember that there is a very great difference between the assessment of the damages in an action founded on a wrong (*e.g.* libel, or assault), and in an action founded on a breach of contract. In the former case, not only do you consider the question of compensating the sufferer, but, sometimes, of punishing the wrong-doer. Thus, if Jackson has broken my armchair, value £5, by negligence, I shall be awarded £5 damages; but if he has forced his way into my drawing-room, and there broken the chair, and used abusive language to me, I shall recover more than £5, though that is all the damage Jackson has actually done. The point is that a wrongful act may be aggravated in law by the manner in which that act is done. Here we see an unconscious survival of the theory I have explained a page ago—namely, that damages are originally a sum paid to escape retaliation and revenge, and these would be regulated not by the amount of harm done so much as by the manner of doing it.

In contract, the damages payable are not, except in one case, liable to be inflamed by the bad behaviour of the defender. That one case is our old friend—breach of promise of marriage, where the jury are at liberty to add what are called “sentimental damages” to the loss actually sustained by the jilted one. Very sentimental the same damages are very often, especially when the plaintiff is pretty and artless-looking. But apart from this exceptional instance, if you break a contract, you are liable to pay to the other man *the loss which may fairly and reasonably be considered as naturally arising from the breach*. You are not liable to pay him what he actually did lose by your failure to keep your promise. Let me show you the difference. You bought goods from Brown, promising to pay the price, £20, on the 1st of June. The seller had a heavy payment to meet on the 2nd of June, and he could just meet it if you paid your debt promptly. But you did not pay promptly, and Brown, being unable to meet his payment, was



let in for a heavy lawsuit, which cost him £300 in expenses, besides the annoyance, inconvenience, and worry. And all because you did not perform your contract. Brown then begins an action against you for damages for breach of contract, and the question is—what damages is he entitled to? Poetic justice would seem to require that you should pay your opponent the £300 that he lost, and some compensation for the worry and annoyance he was put to. But such is not the law. The damages (in addition to the £20 debt) will be simply the usual rate of interest from the 1st of June, when you ought to have paid, to the time you do pay. The reason is that *according to the usual course of things* the interest is the loss Brown would suffer—the amount, that is, which he could, in the usual way, have earned with the money if he had had it on the 1st of June.

The argument put forward by the judges in deciding this rule is practically this: In cases of Contract, everything, even the damages for breach, depends on the intention of the parties when they made the agreement. If they were silent on a particular point, the Court will presume they intended what was reasonable, and the most reasonable damages in breach of contract are the loss naturally flowing from that breach. It would be unreasonable to take the actual loss sustained. Thus, when you agreed to pay Brown £20 for goods on the 1st of June, you never contemplated that Brown might lose £300 if you were a day late in paying. When you buy a penny bootlace, the seller informing you of its superlative quality, and you tie up your boot with it, and run to catch a train, and the lace breaks, and you trip over the broken end, and you miss your train, and thereby are late for business, and so lose a contract with a profit of £100 in it: you can hardly claim that £100 as damages for breach of contract in selling a rotten bootlace for a good one. You see, the harm that actually happened was never in the contemplation of the parties at the time the lace was sold.

The damages for breach of a contract to do work or perform services were discussed by the judges in a case that occurred in 1854. Messrs. Hadley & Co. were the owners of a steam grist-mill. One day the shaft of the mill broke, and Messrs. Hadley gave the two pieces to Mr. Baxendale, a carrier, to be taken to an engineer as a model for a new shaft. By some negligence on the part of Baxendale's servants, the delivery of the broken shaft was delayed for several days, what time the engineer's men were all engaged on something else which they could not leave, and so could not begin on the new shaft immediately on the arrival of the old one, as they had intended. Result: new shaft two or three weeks late; mill stopped all that time; loss of business and profit and temper on the part of Messrs. Hadley. What made these gentlemen the more incensed was that they had told the carrier's servant who received the parcel what it was, and that it was to serve as a model for a new shaft, and that they wished it to be delivered promptly. An action was brought, in which the millers claimed from Baxendale the loss of profits caused by his delay; but they did not succeed, because the damages claimed were not the natural outcome of the carrier's breach of contract. Baron Alderson put it in this way: "The loss of profit here cannot reasonably be considered such a consequence of a breach of contract as could have been reasonably and fairly contemplated by both these parties when they made

this contract, for such loss would not have flowed naturally from the breach of this contract *in the great multitude of such cases in ordinary circumstances.*"

Suppose you break a small part of a machine, without which the machine cannot work and the business of your factory cannot proceed, and you give the broken pieces to someone and tell him to mend them, and he manages to lose the broken part altogether, so that a new part has to be made—an operation taking a couple of days: you cannot charge the man with loss of profits of your business during those two days. You can only charge him with the value of the broken shaft.

In the case of *building*, say, a shop, where the contract is to have it finished ready for occupation on the 1st of December. If the shop is not finished in time, the employer would recover the amount of his probable profits; because it is held that a man who undertakes to build business premises knows that delay on his part must mean loss of business, and he contemplates that when he undertakes the job.

*Contracts for the sale of land* may be broken either by (a) the vendor refusing, or being unable, to convey (*i.e.* transfer) the land to the purchaser, or by (b) the purchaser refusing to pay the price, or refusing to take a transfer. In (a) actions by the purchaser against the vendor for refusing to convey, the purchaser can recover all the expenses he has been put to in connection with the matter, and any other special or actual loss he has sustained in consequence of such refusal. As to expenses—everybody who has ever purchased land knows that a solicitor has to be employed to investigate the vendor's title—that is, his legal right to sell. The law relating to the ownership of land in England and in Scotland is so complicated, that you may think you have a good title to the land—think it is yours, when really, through a mistake in a former deed, or some other accident, you have no right at all; or, at best, only a very doubtful one. Therefore, after you have contracted to buy land, your lawyer always goes carefully through the deeds produced by the seller, to see that everything is satisfactory. No sane man completes a purchase of land without such an investigation, which may be, and often is, a long and expensive matter, and which can only be done by a lawyer. If, then, you agree to purchase, and your lawyer makes these inquiries, and afterwards the seller declines to go on, you can compel him to pay your lawyer's charges. The latter may have prepared on your behalf a deed of conveyance of the property, and you can compel the seller to pay for this also.

In addition, you may have made arrangements to move into the house, if it be a house which you are purchasing, and you can charge the vendor with this expense also. Or you may be a farmer, or grazier, or market-gardener, buying a piece of land without a house; and you may have given notice to quit your present fields. In such a case you are sure to be put to a lot of expense through the seller declining to convey, and this you can recover in an action for damages. Most serious of all is it when the premises contracted to be sold consist of a shop, and you have arranged to leave your present one and enter the new one. You can then charge the seller with damages for loss of business.

Besides these two heads of damage, there is a third, which lawyers generally call "damages for loss of bargain." In ordinary English this means the payment



of a sum to the purchaser to compensate him for what he would have gained had the sale been completed. If you contract to buy a house from Green for £500, and Green refuses to complete the transaction, and you can prove that the house was worth £550, you claim £50 from Green for loss of bargain. How are you to prove that the house was worth more than you agreed to give for it? There are two instances in which such proof is easy. In the first place, you may have contracted with Brown to re-sell it to him for £550. That is clear proof in the eyes of the law of the value of the place. At all events, it is clear proof that you could have made a profit of £50, of which profit you have been deprived through Green refusing to act up to his bargain with you. A second instance of clear proof is when Green, after having bargained to sell to you for £500, receives an offer of £550 from Black. There can be no doubt, then, that you had a very good bargain, and Green will be obliged to disgorge to you that extra £50.

It is quite a common thing for people to buy land and re-sell it at a profit before it is actually their own. There are, in fact, many men who make a very fair living out of it. One of these men, whom we will call Mr. Smart, hears, in that mysterious way these people do contrive to hear things, that Mr. McDonald has a piece of land to sell, which piece of land Mr. O'Reilly wishes to buy in order to erect a new shop on it. Smart has a good idea that O'Reilly will not let the land slip for the difference of forty or fifty pounds; so he hurries off to McDonald and offers £300 for the plot. The offer is accepted and the contract signed, and the next day O'Reilly appears on the scene and offers McDonald a price for the ground. Of course, the offer has to be refused. Should the price named be a very tempting one, so that McDonald accepts it, and refuses to carry out his engagement with Smart, he will not gain anything; for that acute gentleman will make Mr. McDonald pay over every halfpenny that he receives beyond £300. If, on the other hand, McDonald sadly but firmly refuses to break the bargain he has already made, O'Reilly must have recourse to Smart, who makes a greater or lesser profit according as O'Reilly's need for the land is much or little. I once, in a professional way, came across a man who had made as much as £400 in three weeks by two or three forestalling transactions of the kind described. All the same, I do not advise any of my readers to take up that line of business, for, as in all speculative affairs, the risk is great. The man I knew was bitten very badly in a subsequent deal. He heard that a railway company intended to extend a station by taking in land on the north side. He promptly contracted to buy that land, worth about £1,500, for £1,900, anticipating a speedy sale to the company at a good profit. But the railway people extended their station to the south, wherefore my wily acquaintance found that he had bought a white elephant. He tried to escape from his contract, but the vendor, having much the best of the bargain, refused to let him go; and in the end he dropped close on £600 in costs and in what he lost on the re-sale of the property. It was such a clear case of the engineer being hoist with his own petard, that he received mighty little sympathy.

There is, however, another remedy for refusal to transfer land, and of that I will treat on page 407.

As to (b), when the seller is unable to convey according to contract, that is

a different matter. You may think it strange that one should agree to sell land which he is unable to sell; but the explanation will be found in the last paragraph. When your lawyer is investigating the vendor's title he may find a flaw in it. Thus: the vendor is Green, who bought the property six years ago from Black. Now Black claimed to inherit it as his father's heir—the heir being the eldest surviving son, provided that no older deceased son left any children. Your lawyer finds out that Black had an elder brother, who is reported to have died in America; but there is no certificate of his death, and nothing to show that, even if he is dead, he left no children behind him. Because if he left a child, the latter will be the heir to the land (p. 55). This is a very serious flaw in Green's title, because if you pay your money and take the land, Black's elder brother, or a child of his, might turn up the next day and oust you from your purchase, and you would not be able to get a penny of your money back. Therefore, if Green cannot satisfy you that Black's elder brother died childless, you refuse to take the land. But it is Green who has broken the contract, because it is always understood or implied in a contract for the sale of land, that the vendor shall "make out a good title," as lawyers call it. Hence you can sue Green for damages for breaking his contract—the breach being the unsatisfactory title. What amount of damages can you recover? In this case you can only get the expenses of such investigation as I have described. If you have made arrangements to move into your new purchase, and so incurred expense, you cannot claim this. Why not? Well, because you ought not to have made such arrangements until the title had been thoroughly investigated. Such cases as I have described in this paragraph are of no uncommon occurrence, and you ought never to count upon a conveyance of land being completed until your lawyers tell you that they find the vendor's title satisfactory. Therefore, you ought not to have arranged to take possession. Moreover, when a sale of land goes off through a defect in title, the buyer cannot make any claim for "loss of bargain."

To sum up: when the vendor breaks the contract because he *can* not transfer the land to you, you can make him pay expenses of investigating title only; but when it is because he *will* not carry out his agreement, you can recover not only these but also all other expenses you have been put to, and any profit you might have made.

Now let us take the case of the purchaser refusing to carry out the contract. What damages will the vendor be entitled to? In an action of this kind, the judge declared the law as follows:—"The question is, how much worse is the plaintiff by the diminution in the value of the land, or the loss of the purchase money, in consequence of the non-performance of the contract?" The best way of ascertaining this is for the owner of the land to put it up to auction. If it realises a higher price than the one agreed to be paid under the broken contract, the vendor can claim no damages, for the obvious reason that he has sustained none. If it realises less, he can claim the difference, because that is clearly a loss sustained by him in consequence of the breach of agreement. He can also claim any lawyer's costs he has had to pay in connection with the broken contract, for it is evident that this is money thrown away by reason of the purchaser not carrying out his bargain. Even if he does not sell the land to



anyone else, the seller can always claim the useless lawyer's bill, in addition to any other loss that he can prove. It will, however, be difficult for him to prove any other loss unless he has re-sold.

*Forfeiture of Deposit.*—As a rule, when you agree to buy land, you pay a deposit when you sign the contract—the usual amount being ten per cent. on the purchase money. The balance is paid when the deeds are signed, which is the date when you actually become owner of the property. Most of such contracts contain a clause like this: "If the purchaser shall fail to carry out this contract, the deposit shall be forfeited to the vendor, as and by way of liquidated damages." Should the buyer then break the contract, the seller simply retains the deposit—an easy way of avoiding controversy as to the amount he is entitled to for the breach of agreement.

*Agreements for Leases.*—If you agree to let a house, and the lessee refuses unjustifiably to carry out his agreement, and will not take the place, you are entitled to damages on the same principle as in the sale of a house. In the latter case you have the right to sell the property, and charge the purchaser the difference between his price and the one actually obtained. In the former case you should try to find another tenant, and if you are obliged to accept a lower rental, your damages are the difference between that rental and the one agreed to be given under the broken contract. Thus, when X agreed to let a house to Y at a rent of £500 a year for ten years, and Y refused (I believe he was really unable) to carry out his agreement, X let the house for the ten years to Q, who would only give £480 a year. X recovered from Y the difference—that is, £200, being a loss of £20 a year for ten years.

Suppose X had been unable to find a tenant for a year, he could have claimed a whole year's rent from Y. But X would not have been entitled to this unless he could show that he had made diligent efforts to find another tenant, but without success. On the other hand, if he had procured a tenant for the whole ten years at £500 a year, he could have claimed nothing, unless he had gone to the expense of having a lease prepared in Y's name, in which case he might have compelled Y to pay the bill of the lawyer who drew up the lease.

I may say that in an agreement for a long lease it is not unusual for the proposed lessee to pay a deposit, upon the terms of forfeiting the amount if he fails to carry out his bargain; but this is not so common as in agreements for sale.

Some landlords, in circumstances such as I have described, try to charge the tenant with the repairs and decorations done to the house. As all householders know, when one takes a house, he usually requests the landlord to put it in repair before the lease begins. If the landlord agrees, and does these repairs, and the tenant ultimately refuses to sign the lease, the latter cannot be called upon to pay for the repairs. Why not? Because the landlord has the benefit of them. He has improved his property, and the money spent is not, like the lawyer's bill for preparing the abortive lease, utterly wasted and thrown away.

*Contracts for work and labour.*—Contracts for work and labour are, perhaps, the most common of all, next to contracts for the sale of goods. Breach of such a contract may occur in several ways: (a) by the employer refusing to pay

for the work ; (b) by the workman refusing to go on with the work ; (c) by the workman doing the work badly.

The case is a simple one when the work has all been done according to contract, for here the damages will consist of the price of the work. It is still more easy when the parties fixed the price beforehand, but not quite so simple when the price has not been fixed. One of my drain-pipes bursts, and I send for a man and tell him to mend it, nothing being said about the price of the work. When the pipe is mended, I receive a bill for £5, say, when I only expected to be called on to pay about £1. I refuse to pay, writing a letter in these terms :—

SIR,—I have received your bill for mending my drain-pipe, and I have to say that your charges are preposterous. If you send in an account for a reasonable amount, I will pay you ; but I utterly decline to pay £5. I consider £1 quite as much as the work is worth. Yours truly,

PATRICK MURPHY O'BRIEN.

To Mr. P. Plummer.

Mr. Plummer promptly sues me for the £5 ; but the judge at the trial takes my view of the case, and awards only £1. Now here comes the part I wish to draw your attention to. I, although I have practically won the case, shall have to pay the costs. Why ? Because, instead of merely writing to Plummer, objecting to his bill, and stating my willingness to pay a reasonable amount, I ought to have gone to him and offered him a reasonable amount—namely, £1. If I had done this, and he had refused it, and afterwards sued me and only recovered £1, he would have had to pay my costs.

A second class of case where questions are apt to arise is where work and labour of considerable magnitude or lasting a considerable time is to be done, when the question is often asked, "Must payment be made for the work a bit at a time, as it is being done, or must the worker wait until the whole job is completed before he can claim anything ?" This depends a great deal upon the form in which the agreement is expressed. When you agree to do a piece of work "by contract," as it is commonly called—that is, for a lump sum—you cannot claim any payment until the whole work is finished.

But where work is apportioned—that is, where it consists of many items, each at a fixed price, though the whole are added up as the contract price of the complete job—the price for each item will be payable as it is completed, unless the agreement was specially not to pay until the whole job was finished.

When the agreement to do work is not at a fixed price for the job, there can be no such question as to whether you ought or ought not to be paid until you have finished the whole work, for you have a clear right to be paid as you go along. The principle is that the other party must pay for the benefit as it accrues to him. And it is, therefore, a clear breach of contract if, after you have done some of the labour, the other party refuses to pay the value of it. The best instance is where a builder agrees (not for a fixed price) to put a house into thorough repair. He has to mend the roof, re-floor two of the rooms, put up a new staircase to the top floor, put in new window-frames, and reconstruct a chimney. If he had contracted at a fixed price, he could not claim a penny until he had done the whole house ; but as no figure was agreed on, he has the right to



be paid as he finishes each part. Thus, when he has mended the roof, he may demand payment for that part, and bring an action for the price if he be not paid, although he has not done any of the other repairs. When he has put in the new floor, he can claim what is due for that at once, and so on. Another good instance is that of the shipbuilder who agrees (not at a fixed price) to put a ship into repair. As soon as he has completed any specific part of the work, he has the right to be paid for it. Thus, if he had to re-deck the vessel, to caulk her, scrape and paint her, and put on a new copper bottom—as soon as any one of these things is finished, the shipbuilder may demand so much of his remuneration.

Be careful not to attempt to carry this doctrine too far. It has its limits. For instance, if the builder asks to be paid something on account when he has only half finished the floor, or half slated the roof, his demands are illegal and if they are refused, such refusal is not a breach of contract. Nor can the shipbuilder claim payment for caulking one side of the vessel only. The principle is that payment can only be claimed when the man for whom the work is being done has received some tangible, substantial benefit. If the builder has put in a whole floor, or the shipbuilder has caulked the whole ship, the house or the vessel has been substantially improved. It would be difficult to say that a room with only half a floor is very much good, and the same remark applies to a ship caulked on one side but leaking on the other.

If you undertake a contract for a big job at a fixed price, and cannot afford to wait for your money until the whole is completed, the best thing to do is to insert a clause in the agreement similar to that which occurs in shipbuilding contracts: the price of the ship is to be £10,000—£1,000 to be paid when the keel is laid, £2,000 when the hull is completed, and so on as each instalment of the work is finished. Then if the person for whom the work is being done fails to pay one instalment, you can treat this as a breach of contract, sue him for that instalment, and refuse to proceed further until it is paid.

When the workman or contractor does the work badly, the damages are what it will cost the employer to have the matter put right. Thus, if an engineer agrees to repair an engine, and does it badly, he is liable to pay as damages the reasonable cost of repairing his mistakes. In such a case, the fairest course is to ask the engineer himself to come and put the matter right. Another thing to be remembered is that you should give notice to him as soon as you discover that his work is defective, and not wait until he asks you for his money. Scores of times I have seen this kind of thing happen in the Courts: John Jones has done work for Samuel Smith, and has either scamped the job deliberately or has inadvertently made mistakes. Some time afterwards, Jones asks for his money, and then, for the first time, Smith complains of the quality of the work. Jones brings an action for the full amount under the contract, and when Samuel Smith goes into the witness-box to give evidence of the defects complained of, Jones's lawyer always asks him, "On what date did you first make this complaint to Mr. Jones?" The date having been given, the lawyer goes on, "Was this after Mr. Jones had sent in his bill?" And if the answer is "Yes," the said lawyer proceeds to ask the jury to draw the inference that Smith's complaint

is merely an attempt to evade payment, because nothing was said about defects until payment was demanded. Let me add, British juries are very ready to draw that inference, and if this particular one does so, Mr. Smith has only himself to thank. For it was clearly his duty, if only in fairness to Jones, to point out the defects as soon as possible, so as to give Jones an opportunity of judging for himself, and of offering to set things right.

**Contracts of Hiring and Service.**—The damages recoverable upon breach of a contract of Hiring and Service vary very much. If the servant has performed the whole of his service and the employer refuses to pay the wages, the damages claimed for such refusal to pay are simply the wages themselves. The servant cannot claim any interest for the period during which the payment has been delayed.

When, however, the action is for wrongful dismissal, very difficult questions frequently arise. This is not so much so when the contract is one determinable on notice, for in that case the claim is limited to the wages during the period when the notice should have run. Thus, if I am engaged as a clerk at thirty shillings a week, subject to a month's notice, and my master dismisses me without notice, I can claim four weeks' wages as damages.

The difficulty arises in cases of hiring for a fixed period. Baron Parke once said, "The distinction is very important between an agreement to retain and employ for a given term, and then to pay for services at the end of the term a sum certain, and simply to pay a sum certain for services at the end of the term." I hope the reader notices the distinction. In the first case, the employer agrees to employ—that is, to give the servant some work to do, by which he is to earn his salary. In the second case, the contract is merely to pay the salary, but with no binding promise by the employer to find work. The first case is: "Work for me as manager of my shop for two years, and I will pay you £200 a year." If the employer dismisses the servant before the two years are up, this is a breach of the contract, and the servant can at once sue for damages. He will not necessarily be able to recover the whole of his salary up to the end of the two years. In fact, if he drops into another situation at the same or a better salary, he can only claim the amount of his wages up to the time of his new engagement.

The second kind of contract of service, as described by Baron Parke, is quite on a different footing. In effect, the master says, "Do you be ready to perform such-and-such services for me for so many years [or weeks, or months], and I will pay you a salary of £100 a year [or week, or month, as the case may be]."

An instance is to be found in the case of the retainer of an actor by the manager of a theatre at a salary. Suppose that Mr. Footlites is engaged for three years, at a salary of £1,000 a year, by the manager of the Theatre Royal. The intention of the parties in making the engagement is that Footlites, during those three years, shall be ready to act when called upon by the manager. It does not mean that the manager is bound to give the actor any part at all. Therefore, if no request is made for his services during those three years, Mr. Footlites has no legal ground of complaint. I daresay he will complain, but he would be well advised not to treat his lack of active employment as a breach of contract. All



that he has any right to is his salary, so long as he is ready and willing to play if, and when, he is called upon by the management. Now suppose, at the end of a year, the manager of the Theatre Royal says to the actor, "I shall not require your services, Mr. Footlites, in the future." What is the legal line to take? In the first place, he can say, "I shall hold myself at your disposal for the next two years"; and he can carry out this line of conduct, and claim his salary at the end of each year—or whatever the usual pay-days happen to be. And if any instalment of his salary is not paid on the proper day, he can bring an action for it the next morning. Thus, if by the contract he is to draw his salary quarterly, he can demand £250 on each of the next succeeding quarter-days; and if the manager declines to pay, Footlites can start a fresh action once a quarter. To win his case, he will merely have to show that he was ready and willing to act at the Theatre Royal.

If the discharged actor brings an action for wrongful dismissal immediately on being told that his services are not required, he will not be entitled to two years' or even one year's salary as damages. The reason is, that in this case the manager of the theatre did not undertake to employ the actor, but only to pay him in return for a promise that the actor would act if, and when, required to do so. It is no breach of contract on the manager's part, then, not to require Footlites to act; therefore, it could not possibly be a breach to tell him that he would not be required to act. But if the dismissal is such that Footlites may fairly suppose it to mean "I shall pay you no more salary," the actor can bring an action for breach of contract at once.

Another point to be considered under the head of damages for Wrongful Dismissal, is where the master has a right to dismiss the servant upon notice, but no special period of notice was specified when the agreement was entered into. The question often arises whether the notice given is sufficient. The answer to the query depends entirely on the answer to another—namely, What is the custom with regard to that class of servants? As I have stated on page 96, a domestic servant is entitled to a month's notice. An ordinary clerk in an office or counting-house is only entitled, as a rule, to a week's warning; a managing clerk to a month at least. A shop-assistant at weekly wages must be content with a week, though a shopwalker can claim a month; and the manager of a large retail business is, in some trades, I believe, entitled to three months' notice. So it goes on: the rule being that the higher the position of the servant, the more notice he is entitled to. I suppose the reason is that a man in a more important position is likely to have greater difficulty in procuring another similar situation than a servant in a less important position. I mean, that a shopwalker is not likely to obtain another post in the same capacity, as is an ordinary assistant. Therefore, the former ought to have longer notice in order to give him more time to look about for a fresh engagement. At the same time, the law as to notice is so hazy, except in the case of domestic servants, that I advise both masters and servants always to make an agreement on the subject at the time the contract of hiring and service is entered into.

**Specific Performance.**—When a schoolboy does not learn his lesson, the master can deal with him in one of two ways. He can punish him for not having

done what he ought to have done ; or he can make him "stay in" during play hours until the lesson is learnt. The law is a schoolmaster ; and if you do not perform what you ought, *i.e.* what you have promised, you will either be punished (damages), or compelled to do what you ought to have done (Specific Performance). There are certain contracts which, if they are broken, cannot be adequately compensated for by mere damages. To show the difference between contracts the breach of which can be amply remedied by a money payment and those which cannot, let us consider the following two cases: (1) Thomas agrees to sell to James one hundred hogsheads of sugar at 26s. a hogshead, to be delivered on the 1st of March. On the delivery day, sugar has risen 2s. a hogshead, and Thomas refuses to deliver. All that James has to do is to go to another sugar-broker and buy one hundred hogsheads at the increased price—about which there will not be the slightest difficulty, for there is always plenty of sugar in the market. Then Thomas has to pay James the difference of 2s. a hogshead, on receiving which James is in exactly the same position as he would have been if the contract had been carried through. So that money damages are an ample compensation for the breach of contract.

(2) But suppose Thomas had agreed to sell a Raphael Madonna to James for 10,000 guineas, and afterwards, repenting his bargain, he tried to draw out. James would not be able to go on the market and buy another Raphael Madonna, and charge Thomas with the difference in price, for the very obvious reason that there is only one such picture. Moreover, if he really wanted the great work of art—and you must assume that if he did not want it he would not have agreed to buy it—no amount of money would compensate him for the loss of his purchase. In fact, the only thing that can satisfy James is to have his picture, and by the law as it stands at the present time he can compel Thomas to hand it over, or, as lawyers say, specifically to perform the contract.

Or, again, if the agreement is one for the sale of land, this is not quite like the contract for the sale of a Raphael Madonna, but it is very nearly like it. True, there is always plenty of land in the market, and there are very, very few Raphael Madonnas. But everybody knows that when a man buys a piece of land, he generally wants that particular piece and no other. He may like the way it is laid out, or the situation, or the view, or the historic associations, but there is sure to be something that made him fix on that spot in preference to any other. It is not like buying so many hogsheads of Demerara sugar. You do not want any particular hundred hogsheads. It is quite sufficient if you obtain a hundred, no matter where they come from ; and it makes no difference to you whether they are the hundred you saw in Jones's warehouse, or any other hundred, provided the quality be the same, and you do not have to pay more for them. But the man who bought the cottage at Alloway in which Burns was born would be by no means satisfied if, after the bargain was made, the seller refused to hand it over, and offered in its place another cottage just as well built, just as big, and just as old.

Again, if Johnson agrees to buy Number 10, Holly Place, as a dwelling-house for himself, the seller cannot go off his bargain, and offer Johnson Number 12 instead, even though Number 12 may appear to be quite as eligible a residence as



Number 10. As far as the house itself is concerned—I mean as to floor space, quality of the building, fittings and so on—Number 12 may be worth quite as much in the market as Number 10. All the same, it may not be of the same value to Johnson. For instance, Johnson may be a man who loves peace and quiet, and he chooses Number 10, partly because his neighbours at 9 and 11 were old people with no children, whereas, at Number 13 there lives a family comprising six small boys. There may be reasons even more substantial why Johnson wants Number 10 and will not have Number 12—as that Mrs. Johnson likes mulberry-trees, of which a specimen grows in the garden of Number 10, while the same lady detests holly-bushes, one of which is conspicuous at 12. He may have fifty good reasons for the preference, or he may have none.

In the case of the sale of an article of a kind not to be bought on the open market, or, to put it another way, not an ordinary article of commercial dealing, if the seller refuses to transfer the article, he will be compelled to do so by the Courts. The same thing applies to sales of land, and to agreements for leases of any considerable length. It applies, in fact, to all agreements where, if X has agreed to do something for the benefit of Y, it will be no adequate satisfaction to the latter if X offers him a sum of money to be let off the bargain. For that is what damages for breach of contract amount to. The distinction is seen by contrasting two well-known cases. One was an action by Mr. Cuddee, who asked the Court of Chancery to order Mr. Rutter specifically to perform a contract to transfer £1,000 South Sea Stock to Cuddee. The Court refused, because that kind of stock can always be bought on the Stock Exchange, any day in the week, and it would be quite as good for Cuddee if Rutter paid him such a sum of money as would enable him to buy from someone else—that is, if Rutter had agreed to sell at £104 per share, and the stock had risen to £109. Rutter must pay  $£5 \times 10 = £50$ , which would enable Cuddee to buy other stock without loss.

The other case was that of Mr. Albrect, who brought an action to compel Mr. Duncuft to transfer fifty shares in the London and South-Western Railway Company, which Duncuft had agreed to sell to Albrect. Duncuft did not want to part with the shares, for they had increased in value, and showed signs of increasing still more. But it was held that he must transfer them, and could not escape from his contract merely by paying the difference between the contract price and the value at the date when he ought to have transferred the shares.

The difference is this: With regard to Government Stock, such as Consols, East India Stock, Local Loans Stock and the like, there is such an enormous number of these that they are always to be had on the market by anyone who chooses to apply for them; but shares in private companies, such as Railway Companies, Mining Companies, and the like, are not always to be had when you want them, because they are limited in number. Thus, if you wanted to buy 100 shares in Cassell and Company, Limited, you might have to wait a week or two before you could get them, but you could buy £10,000 worth of Consols any day. Therefore, damages will be an adequate and satisfactory remedy for a refusal to transfer Public Government Stock, but not for refusing to transfer stocks or shares in a private or local undertaking.

In the old slavery days, a man named Pearne had agreed to hire from one Lisle fourteen negroes, in Antigua, and Lisle refused to hand them over. Upon this, Pearne craved assistance from the Court of Chancery, asking that Lisle might be ordered to hand over the slaves. But Lord Chancellor Hardwicke refused, on the ground that any other fourteen negroes would do.

To sum up, when there is a contract by which goods and chattels ought to be delivered to you, you can get an order for such delivery to be made when the article in question is a thing of special value, not procurable elsewhere, upon which there is some peculiar value set by affection, artistic taste, etc. The following articles have been ordered to be delivered up: An ancient silver altar-piece, remarkable for a Greek inscription and a dedication to Hercules; a silver tobacco-box, enclosed in two large silver cases, all ornamented with engravings of public transactions and with heads of distinguished persons; an ancient horn, called the Pusey Horn, and heirloom of the Pusey family, bearing the inscription, "Pecote this Horne to hold Huy thy Lands"; two curious and beautiful china jars or vases; a cherry-stone, curiously carved; old masonic dresses and ornaments; statues; and pictures.

Then, again, a contract for the sale of land, or for a lease for a definite period, will always be enforced in the same way. But not a contract to grant a lease from year to year (p. 136), because such a lease could be put an end to by six months' notice the very first year.

Other agreements there be, not relating to the sale of anything, which the Court will order to be carried out, where the awarding of a sum of damages would be inadequate. Such as this: John Smith agrees with Thomas Jones that on Thomas Jones marrying Angelina Smith, John Smith will settle so much money on the new Mrs. Jones and any children she may have. Suppose Smith breaks his word, and, after the marriage, refuses to produce the money. His son-in-law brings an action against him; but the action ought to be for performance of the contract, not for damages for breaking it. Because if Smith were to pay Jones a sum as damages, what bit the nearer would Mrs. Jones and her children be to a provision for them?

There are certain contracts which the Court will not order to be carried out specifically. They will make the breaker pay damages for his breach, but they will not compel him actually to do what he agreed to do. The first kind in which damages will be the only remedy is **Contracts of personal service**. If I have agreed to serve a man for a year, and at the end of a week I quarrel with him—it may be all my own fault—no judge will order me to go back and finish my engagement. Why not? Simply because the remedy would be worse than the disease. The same thing applies to all contracts where the parties are brought into close and frequent personal relations—such as Partnership. The second kind is **Contracts which the Court cannot perform** or satisfactorily overlook. Take the case of a contract for the sale of a piece of land: The vendor has only to furnish an abstract, or epitome, of his title-deeds to the purchaser; to sign, seal, and deliver a deed; and to pocket the money. If he obstinately refuses to do these, the Court can do them for him. An official of the Court can prepare the abstract, sign, seal, and deliver the deed, receive



the money, and put it in the bank. You may object that unless the owner of the land himself signs it, the deed is no good ; but you are wrong. The Court will make an order directing the official to sign for him, and that has the same effect as his own signature. But every contract is not so simple. Suppose you have contracted to build a house for me, and afterwards refuse to go on. The Court could not send one of its officials down to complete the work ; and if you were ordered to do it, under fear of being sent to prison, you might easily revenge yourself by doing the job as badly as it could be done ; and how could an officer of the Court detect it ? On the same principle, if I agree to write a book for you, and then refuse to write it, the Court will not say to me, "Go, write," but will merely order me to pay damages, because how is a Master of the Court of Chancery to judge whether anything I might write was up to the level of my reputation ?

Besides specific performance of a contract by ordering one to do what he has promised, there is specific performance by prohibiting one to do something which he has promised not to do. As a rule, it is much more easy to persuade a Court to order a man not to do something than to order him positively to do something. An instance will show you what I mean : "Mademoiselle Johanna Wagner, cantatrice of the Court of His Majesty the King of Prussia, agrees with Mr. Benjamin Lumley, possessor of Her Majesty's Theatre, London, etc. First, Mdlle. Wagner binds herself to sing three months at the theatre of Mr. Lumley, Her Majesty's, at London, to date from the 1st of April, 1852. [Then follow stipulations about the parts to be sung, salary, and so on, and the agreement continues]. Lastly, Mdlle. Wagner engages herself not to use her talents at any other theatre, public or private, without the written authorisation of Mr. Lumley." After signing this agreement, the lady changed her mind—a privilege generally conceded to her sex in matters social. But she soon discovered that in matters legal no such privilege existed. Having thrown up her engagement with Mr. Lumley, to sing at Her Majesty's, Mdlle. Wagner agreed to sing at the Royal Italian Opera, Covent Garden, a theatre in the possession of Mr. Gye. Lumley was not exactly pleased. In fact, he felt doubly aggrieved ; first, at his star refusing to shine on the audiences at Her Majesty's, and, secondly, at her going to place herself in the firmament of the Covent Garden house. An action-at-law was the result, and, after a most elaborate fight, Lord Chancellor St. Leonards decided that although he could not order the young lady to serve Mr. Lumley, he could at all events prevent her from damaging that gentleman by singing for Mr. Gye. The which the Lord Chancellor did, with the result that all wise theatrical managers, when they engage their *prima donna*, *primo tenore*, and so on, insert in the contract something like this : "Signor Fuscogno agrees to sing for Mr. Impresario at the Theatre Operatic for three months from the 1st of May, and during that time not to sing for anyone else." Suppose the latter part of the clause was missed out, what would happen ? Why, simply this, that if the *primo tenore* broke his engagement and went to sing for a rival, Impresario could not stop him. His only right would be to sue Signor Fuscogno for damages. For with regard to contracts of personal service, the Courts are very chary of issuing an order to prevent a man from carrying on his trade,

business or profession in any way he pleases ; and they will, in fact, never do so unless the man has absolutely agreed not to carry on his business in that particular way.

To show you to what extent this chariness is carried, take the case of Mr. Hardman, who agreed with the Whitwood Chemical Company to enter their service as manager for a period of five years, and during that time "to give his whole time" to the company. In a short time Mr. Hardman left the Whitwood, and started a rival company, whose manager he became. The Whitwood people applied for an injunction to prohibit Mr. Hardman from working for the new company, on the ground that he had agreed to "give his whole time" to them (the Whitwood), which was as good as saying he would not work for anybody else until the five years were up. But the Court refused to interfere in this way. They laid it down as the law, that unless a man had actually and in so many words said, "*I will work for you, and I will not, for so long, work for anybody else,*" that man would not be prohibited from working for another employer if he deserted his first engagement. Therefore, if you engage a confidential servant, whom you are bound to entrust with your business secrets, remember, that to prevent him from learning your business and then selling his knowledge and experience to a rival, you must engage him for a *certain* time, and get him to agree that during that time he will *not* work for anyone else. I repeat, nothing less explicit will be of any use to you.

But in other contracts, not of personal service, when you have an agreement that A B will do so and so for C D, and A B refuses to carry out his agreement, C D can have him prohibited from doing anything contrary to the agreement. Thus, A B has agreed to grant, for a certain consideration, to C D the sole right to use and manufacture a patent sheep-shearing machine. This right, called a licence, must be granted by deed ; and C D orders his lawyer to prepare a deed and present it to A B for execution. When the lawyer does so, A B refuses to have anything to do with it. What must C D do ? He ought at once, and without delay, to bring an action against A B for specific performance of the contract ; but for fear A B should grant a licence to someone else before the trial can come on, C D will be wise to apply to the Court at once for an order to prevent A B from giving a licence to anyone else. You observe that this case is something like that of Mr. Hardman and the Whitwood Chemical Company. In the latter case there was an agreement to "give his whole time"—leading to the obvious and only reasonable inference that he was not to work for anyone else. Yet the Court refused to prohibit him from working for a rival company. In the patent case, A B is to grant the "sole right, etc.," to C D ; so that again it is only a matter of inference that A B is to grant no licence to anyone else. Yet in this case the Court will prohibit A B from granting a licence to any other than C D. The moral to be drawn is, that when, from a positive promise to do something, the Court must infer an obligation not to do something else, the inferential obligation will be enforced by an injunction. The only exception is in the case of a contract involving personal service or personal relations (such as partnership) : in that case the Court will not enforce an inferential promise not to serve anyone else. Of course, you have still your remedy by an action for



damages. The rule is that you are always entitled to damages for a breach of contract, though only sometimes to specific performance. I ought, perhaps, to remark here that if you are ordered by the Court to do or not to do something, and you disobey that order, you are liable to be sent to prison, and kept there as long as the judge thinks you deserve it.

**Release of the other person** from his obligation. This is, as I have stated (p. 395), sometimes the result of a breach of contract. The question is, "When?" and no question in business life is more difficult to answer as applied to this or that particular contract. I cannot give you an exhaustive list of breaches of contract which are, or are not, sufficient to release the other party from his share of the bargain. I can only lay down rules. Still, these rules will be useful to those who bear them in mind, just as an Ordnance Survey map is useful to enable you to find the way to Jones's house, though the house itself is not marked upon the map.

The first and cardinal rule is:—That if X and Y have exchanged mutual promises, and X breaks his promise, Y is not freed from his obligations unless X's breach goes to the root of the contract. Examples of that you have had in the case of the two theatrical contracts set out in detail on pp. 373-6. You may safely say that if X utterly and entirely fails to fulfil any part of his promise, Y is not bound to fulfil any of his. But you have difficulties when a contract is divided into parts. Thus, in a building contract the employer is to pay the builder £200 when the walls are put up, £100 when the roof is completed, and so on. The builder finishes the walls and asks for the £200. The employer does not pay. It is a serious question whether the builder is now discharged from the rest of his agreement, or whether he ought to bring an action for the £200 and go on with the rest of the job, or whether he can merely refuse to go on until the £200 is paid; but when it is paid he is bound to resume work. Let me say at once that unless the contract specially provides for it, the builder cannot claim to be released from the rest of his engagement, unless the refusal to pay the £200 is expressed in such a way as to indicate an intention on the part of the employer not to carry out any of his share of the bargain. The builder's proper course is the one last indicated, namely, to refuse to go on until the £200 is paid, and when it is paid to resume work. But he can also claim damages for delay in payment, and if he has agreed to complete the building in a certain limited time, he will be excused for being late, so far as the lateness is caused by the employer's breach of contract.

The same question arises most frequently in contracts for the sale of goods to be delivered or paid for in instalments. Here the query asked is always this: "If the first instalment of the goods be not accepted or not paid for, is that a reason for refusing to deliver any more goods under the contract?" Looked at from the buyer's point of view, the question becomes: "The seller has not delivered the first instalment: am I bound to take the next if it comes?" Take this case, for instance: Crippin & Co. agreed to sell to Simpson & Co. 6,000 to 8,000 tons of coal in equal monthly quantities during twelve months from the 1st of July. Simpson & Co. were to

send their own waggons for the coal. During the month of July they sent waggons sufficient to carry 158 tons, which was not an equal twelfth part of 6,000. Messrs. Crippin threw up the contract, on the ground that Simpson & Co. had broken their part of the agreement. It was an undoubted fact, nor did Simpsons deny it, that a breach of agreement had been committed by them, but they denied the right of Crippin & Co. to cancel the whole contract because one part of it had not been performed. The Court, after some consideration, decided that Messrs. Crippin had no right to cancel the contract.

Now for another case, which seems to be contradictory, but really is not. H agreed to buy from M 2,000 tons of iron, to be delivered in three equal monthly instalments. When, however, the first month came, H was not ready to receive the instalment, and so M wrote cancelling the contract. Then H sued for damages, but he did not get them. For M was held to be entitled to throw up the bargain when H did not take the first instalment. This looks like the case of Simpson and Crippin over again, "but decided the opposite way," as the Irish judge said, "for the sake of variety." But if you examine the cases closely you will see the great difference. In one case, Simpson & Co. only broke their contract to the extent of 342 tons out of 6,000, or rather less than one-seventeenth. In the other case, H failed to do his duty to the extent of one-third—666 $\frac{2}{3}$  tons out of 2,000. So that if you take as your rule, "Does the breach go to the root of the contract?" you must admit that non-performance of one-third does go to the root, while non-performance of one-seventeenth does not.

As I said, the question here dealt with may arise upon *failure of the buyer to pay for the first instalment*, as well as on refusal to deliver or to accept the first lot of goods. As when Mr. Freeth bought from Mr. Burr goods to be delivered in instalments, and paid for as each lot was delivered. Burr was very late in delivering the first instalment, and Freeth, besides claiming damages for late delivery of that lot, declined to pay for the instalment at all. He said: "I know you will be late with the next lot, so I will keep the money in hand to pay myself the damages that may arise." I need hardly say, perhaps, that he had no business to do anything of the kind; but Mr. Burr, instead of merely suing him for the money, said, "Very well, I shall not deliver any more. I throw up the contract." Whereupon Freeth brought an action for damages caused by refusal to deliver. The Court took a long time to think the matter over, but eventually decided that Burr had no right to cancel the contract because Freeth, under a mistaken notion of his rights, refused to pay for the first instalment. Burr could have said, "I will not deliver any more until you pay me for what you have had," but that was all he could do.

But the judges were very careful to say that if Freeth had refused to pay for one instalment in such terms as to "evinced an intention no longer to be bound by the contract," Burr would have been justified in throwing it up. To apply this to cases of delivery in instalments, if A delivers the first instalment of goods a day late, and B, the buyer, declines to accept them on that account, and at the same time says, "Your goods are of no use to me now;



you need not deliver any more," A can take him at his word, and can bring his action at once for breach of the whole contract, besides being released from the contract.

*Advice.*—It is always best, where goods have to be delivered and paid for in instalments, to state explicitly in the contract whether non-delivery, or refusal to accept, or non-payment of the price of the first instalment, is to entitle the other person to rescind the rest of the agreement.

## SECTION VII.

### WHEN CONTRACTS ARE PUT AN END TO.

**Discharge by breach**—By performance—What is performance?—Substantial performance—Being ready and willing—Debtor must seek creditor—Debt must be paid in money—Legal tender—Always tender what you conceive to be owing—Tender must be made in business hours—No right to a receipt—Discharge by mutual agreement—When contract entirely unperformed—When part performed—Discharge by substituting another contract—You can assign rights, but not liabilities—Merging—Effect of a judgment—Discharge by death—Contracts involving personal skill or attention—Promises to marry—A legal curiosity—Discharge by illness—Schools: a quarter's notice unnecessary when child ill—Discharge by bankruptcy—All contracts not discharged by bankruptcy—Creditors get the benefit of bankrupts' contracts, except for personal services—Penalty on undischarged bankrupt in certain cases—Discharge by impossibility of performance—Contracts impossible when made—Notoriously physically impossible—Impossible in law—Be sure you can perform what you promise—Impossibility arising after contract is made—Absolute promises sometimes foolish.

CONTRACTS may be discharged by breach, as I have shown on pp. 412-14. But there are other ways of doing it. The most satisfactory is by (a) *Performance*; then come (b) *Mutual Agreement not to require the contract to be performed*; (c) *Substituting another contract*; (d) *Death*; (e) *Illness*; (f) *Bankruptcy*; (g) *Impossibility*.

(a) **Performance.**—As a rule, a substantial performance of the contract is all that can be required. I mean, that if you have contracted to do work for Brown, and to finish it by a certain date, you have, as a rule, substantially performed your contract if you do the work, even though you may be a day or two late. I say as a rule, because there are cases (pp. 377-8) when time is of the very essence of the contract. And the rule must also be taken subject to this qualification: that Brown can make you pay him any loss which has happened to him as the reasonably natural result of your breach of agreement. The rule applies not only with regard to time, but also with regard to other things. Suppose, for instance, that you have done your work reasonably well, Brown cannot reject it because it is not perfect. If the fact of the quality being even a little under what has been agreed upon causes Brown loss, you must be prepared to bear that loss, or to make good the defect, if that be possible. Subject to this qualification, you are entitled to be paid your contract price, because you have substantially performed your agreement.

Sometimes a little less than actual performance counts as performance. It is what lawyers always call "being ready and willing," like Barkis of happy memory. If you agree to pay a livery-stable keeper [carriage hirer in Scotland] £3 a month for the use of a horse and trap two hours a day, he will be able to claim his £3 at the end of the month, though you have not used the horse and trap once. Why? Because he was always ready and willing to allow you to use them, if you had come or sent for them. Of course, if he has sold the trap he contracted to let you use, he cannot sue, even though you never wanted to use it. Why, again? Because he was not ready and willing to perform his part of the bargain, having put it out of his power to do so.

When the contract is to pay money at a certain place, the creditor is bound to go to that place to receive his money, and if he does not, the debtor, if he goes with the money ready to pay, is in a good position, because after that the creditor must go to him. But if no place is mentioned, the debtor must contrive to find the creditor, if he is within the realm, and tender him the money. It occasionally happens that a creditor has a grudge against his debtor. This happened in the case of Mr. X, who owed over £50 to Mr. Y, and he sought out Y to try to pay him; but Y wanted to make X bankrupt, and kept out of the way. When, however, Y presented his bankruptcy petition, it was decided that no debt was legally overdue, because Y, by his own act, had prevented X from fulfilling his obligation.

As I said, when you agree to pay money at a certain place, the creditor must attend there to receive his money. But people have been known to make contracts like this: "A B agrees to pay C D £100 at the Royal Exchange, Glasgow, on or before June 10th, 1896." The question is—is C D obliged to attend at the place named every day until the date mentioned? In other words, can A B, if he is sued for the money, say, "I went to the Exchange on the 9th of June, with the money ready, and C D was not there to receive it"? The answer is, that C D is not obliged to attend every day. It will be enough if he goes on the 10th, because the money is not really due till then. But if, before that date, A B and C D meet at the place, and A B offers to pay, that is a discharge of the agreement.

A promise to pay, or any debt, is not discharged except by payment in money. A cheque is of no value, unless the creditor chooses to accept it. "Money" means gold coinage to any amount, or Bank of England notes, silver up to forty shillings, and bronze coins up to one shilling (*see* p. 142). Thus, if you owe a man two shillings, and offer him twenty-four pennies, he can refuse to take them, and you are not able to say, in law, that you were ready and willing to pay the debt. The same if you owe a man £2 1s., and you offer him the whole amount in silver; but you would be acting correctly to tender him half-a-sovereign and thirty-one shillings. Again, if you owe money, in strict law you should offer the exact amount that is due. You have no right to ask your creditor to give change, though a creditor who refused to do so would be a very unreasonable man, no doubt. If you owe Jones £2 5s., and he says you owe him £2 10s., you ought to go to him and offer him the £2 5s. in coin of the realm—say two sovereigns and



two half-crowns—and tell him you pay it in full discharge. But if the creditor does not object at the time to the quality of the money offered, he cannot object afterwards. You cannot make him give you a receipt. When I say you must offer it to him, I intend myself to be understood literally, for it is not enough to say, “I have come to pay that £2 5s. I owe you,” and when he says, “I will not take less than £2 10s.,” for you to say, “I have it here,” and just put your hand in your pocket, or even take the money out. You should hold it out, so that he can take it; or put it on the table, and say, “Here you are. Pick it up.” Or you can offer it to him in a bag, if you like. The point is, that you must put the exact money within reach of his hand, so that he can take it if he will. Suppose he refuses, you need not offer it a second time. It becomes his duty to come to you. Then if he brings an action against you, and the judge decides that he has no right to more than £2 5s., you will be entitled to half the costs of the action.

It is practically the same with goods. If you ought to deliver goods to a man, it is not enough for you to tell him that you have the goods ready to send on receipt of a letter from him. You ought, in my opinion, to take the goods to him, and offer them, and if they are in boxes or barrels, or in any way covered up, you ought to allow him to open some of the parcels to see that the things are actually there. After that, you have done everything in your power, and if he refuses to take the goods in, he must send for them if he wants them, and pay you damages for declining to take them at first. But if he writes, saying, “It is no good your sending the goods; I will not take them in,” you need not “tender” them formally, you are entitled to take him at his word.

Moreover, a tender, as it is called, of money due on a particular day, must be made on that day and no other; because, if you do not pay on that day, you have broken your contract, and the right of action has already arisen. And it is a principle of law that a tender must have been made before the right of action arose—that is, when the debt was due, not when it was overdue.

Again, you must always make a tender at a reasonable time. If it relates to goods, you have no right to go after business hours and offer them. Nor, if it be money, can you go when a man has gone home to the bosom of his family in the evening.

(b) **Mutual Agreement.**—A contract, as it is entered into by mutual consent, can be discharged in the same way. But there is a great difference between an agreement under which nothing has been done, and an agreement that has been partly performed. When neither party has done anything to carry out his part of the contract, the agreement can be set aside simply by both of them consenting to set it aside. When, however, one of them has done something towards fulfilling his promise and the other has not—the contract cannot be set aside merely by consent. It can only be cancelled by another contract, and a contract, as we know, requires (in England) consideration (p. 276) as well as consent. It comes to this: that when you contract with Brown to do work for you—for instance, to make a machine for you—and after he has started you agree to cancel the arrangement, you cannot legally do it by merely saying, “Let us agree to throw it up.” You see, Brown having done some work is entitled to be paid

for what he has done, and if he promises to give up his right to payment, he is giving up something for nothing. And, as I have shown on page 277, the English law does not recognise gratuitous promises. There must be a *quid pro quo*. What ought you to do, then? The only way is to make an agreement for valuable consideration, which need not necessarily be money (p. 277).

I should recommend the drawing up of an agreement like this:—

Whereas James Brown has agreed to construct a sawing-machine for Samuel Smiles, now in consideration of Samuel Smiles not requiring the machine to be finished, James Brown agrees to forego his right to payment.

(Signed)

JAMES BROWN,  
SAMUEL SMILES.

In Scotland, the mere consent of Smiles and Brown to allow the agreement to go unperformed on both sides will be enough, provided they intend such consent to be legally binding. But no consideration is required, for in Scotland valuable consideration is not essential to any agreement (p. 276).

Let me recommend my English readers to be very careful about agreements to cancel contracts, and to see that they are made properly. In the case above given, Brown might be an honourable man; but Brown might die, and his executors would probably come upon Smiles to be paid for the work done. If the latter had made such an agreement for cancellation as I have sketched out, he would have a complete answer to the claim; but if he had a mere consent, without consideration, he would have no answer at all; because, in law, the contract to make the machine was never cancelled.

(c) **Substituting another Contract.**—I have said something about substituting contracts on page 281 when discussing the law as to compromises. There I stated, or left it to be inferred, that if you made a contract slightly different from the first, intending it to stand instead of the first, it operated as a good discharge of the first contract. Thus, if you have given a bill for £50 due on the 1st of March, and you afterwards agree to pay £25 cash on the 20th of February, instead of meeting the bill, your contract to meet the bill is discharged. This is an instance of substituting one agreement for another made between the same persons.

It is also possible to make a substituted agreement not by altering the terms, but by changing one of the persons. For instance, A has promised to build a barn for B. If B agrees, A can substitute C in his place, so that A will be discharged from his liability, and C will be bound to do the work. When this has been done, it follows that B can have nothing to say to A if the barn is not finished in time, or is not properly constructed. But A cannot put C in his place without B's consent. I should hardly have thought it worth while to mention this point, if I had not come across a man the other day who imagined that he had a right to "transfer his contract," as he called it. My client, whom I will call Jenkins, had made an agreement to build six houses. Finding he had not the money to complete the job, he transferred his contract to another builder, named Alias, but without taking the precaution to ask the consent of the employer. Alias did his work so badly, and was so much behind time, that the employer threatened an action for damages. But he did not threaten Alias; he threatened Jenkins.



I was bound to inform the latter that he had no defence, because although he had the right to transfer all his rights under the contract to Alias, he could by no means transfer his liabilities, except with the employer's consent. It would be preposterous if he could, for when the employer engaged Jenkins to build for him, he did so in reliance upon him. Alias he had never heard of. If Jenkins wanted to transfer the contract, he should have taken care to make Alias agree that if he (Alias) did not carry out the work properly, so that an action was brought against Jenkins, Alias would repay Jenkins anything he (Jenkins) had to pay on that account. This is what is called an indemnity clause.

It is also a rule of law that one contract for identically the same thing can be substituted for another between the same people, if the second contract is of a higher legal nature than the first. This is called merging one contract in another, and its operation may be compared to pouring a pint of wine from a pint glass into a quart glass. You make the liquid less liable to be spilled. Thus, by English law, a contract by deed (p. 284) is of a higher nature than a contract in ordinary form, because a deed is a highly solemn legal transaction, and because you have better remedies under a deed than under an ordinary contract. In the first place, if your debtor dies, you can bring an action either against his executor or against his heir. [The heir is the one who takes the land of the deceased.] If your contract is not by deed, you can only sue his executor. In the second place, your debt runs for twenty years, while an ordinary debt cannot be sued for after six (pp. 285 *et seq.*).

Therefore, if a man owes you something under an ordinary agreement, and you afterwards extract from him the same promise, written in a deed, your first agreement is cancelled, or merged, if you like, in the second. The principle seems to be that the higher includes the lower. Therefore, if you bring your action, be careful to bring it as based upon the deed, or you will lose.

Again, a judgment is a higher security than any other; so that any claim under a contract merges in the judgment. See how this works. You, a gardener, bring an action against a man for work done and goods supplied. Your claim is :

	£	s.	d.
Five days' work of four men at 5s. per man per day ...	5	0	0
100 ferns in pots at 6d. each ... ..	2	10	0
20 palms at 1s. each ... ..	1	0	0
	<hr/>		
	£8	10	0

At the trial, you are, unfortunately, unable to prove (owing, say, to the illness of a witness) that you supplied the twenty palms, so the judge disallows the £1, and gives judgment for you for £7 10s. only. Afterwards, your witness recovers, but you cannot bring a fresh action for the £1, nor give up your verdict for £7 10s. and bring a fresh suit for the full amount. It is a bad job for you, but the judgment is conclusive as to the amount due; and your original contract (value £8 10s.) is merged in your judgment for £7 10s. This has been found to be necessary, for if some such rule were not enforced, there would be no end to litigation; and the parties might fight the same thing over and over again, to the wasting of the public time, and to their own detriment.

(d) **Death.**—In all contracts where the personal factor enters very largely into the quality of the performance, the death of either person puts an end to the contract. To put it another way, contracts involving personal relations or qualities are almost, if not quite, always put an end to by death. An engineer had contracted to build a lighthouse, a sort of work in which he possessed special skill, and in which he had great experience. The engineer died, and the other party to the contract tried to get damages from his executors because the lighthouse was not built. But the judges would have none of it, for the very good and sufficient reason that as the executors could not be expected to be able to finish the lighthouse, it would be absurd to make them pay damages for not doing what they could not be expected to do. Had the agreement related to the building of an ordinary house, which can be done by one builder just about as well as by another, it would have been a different matter.

Suppose, again, you engage Signor Bravissimo, the famous tenor, to sing at a concert, at 100 guineas for the night, and he dies before the date fixed for the performance, you cannot legally claim from his executors damages for breach of contract. The rule cuts both ways, for the executors, on the other hand, have no right to demand to be allowed to sing in place of the deceased, and to receive the promised 100 guineas. If you had the right to damages for non-performance, they would have the right to try to perform, so that the rule is as fair for one as for the other.

A piano manufacturer had agreed to supply a customer with an instrument of his own make. When the piano was about half built, the manufacturer died, and when the customer brought an action against the executors for breach of contract, his action was dismissed with costs. For, as one judge said, how could the manufacturer complete the making of the instrument after he was dead? Here, again, it would have made all the difference if the piano had not to be one of the manufacturer's own make. Moreover, the executors would not have been entitled to employ someone else to finish the construction, for that would have been a violation of the "own make" clause, and the customer could have refused to accept the instrument.

All contracts of personal service, whether domestic or otherwise, are ended when either master or servant dies, for the reasons given on page 102. The same applies to contracts of partnership and apprenticeship, which will be dealt with in Chapters IV. and X. of this Book. It will appear plain, also, that *promises to marry* are cancelled and discharged by the death either of the man or the woman. Cases have been known, however, in which young ladies have consulted their lawyers with reference to bringing actions against the executors of a deceased *fiancé* for breach of promise, and it certainly is hard on a young woman who has bought her wedding garments, and, perhaps, thrown up her situation in anticipation of her marriage, to be unable to recover what she has lost. But the consequences of the law in this respect being altered from its present state would be awkward, not to say ridiculous. For if the contract was not cancelled by the death of the *fiancé*, it follows that the executors would have as good a right as the lady to insist on its being carried



out. Consequently, one of the executors might propose to instal himself or anyone else he chose as bridegroom, and if the young lady refused to be married, the executors might bring an action for breach of promise against her. It is a fact too often lost sight of, that a woman who breaks a promise to marry is just as much liable to an action as a man. I have only heard of one such case, and there the lover recovered from the fair jilt £200 damages. But I imagine that the successful plaintiff did not enjoy himself very much, for the lady's counsel bantered him unmercifully in cross-examination, and his acquaintances made things so hot for him that he was obliged to leave the town for fresh woods and pastures new.

I would call your attention to one curiosity of English law in connection with cancellation of contract by death. It is the rule that if a servant is injured so that the master loses his services, the master can bring an action against the person whose negligence or fault caused the injury. But if the servant is killed, the master has no right to damages against the wrong-doer, on the logical ground that as the service lost is lost after the servant's death, and as the death itself cancels the agreement of service, the master has sustained no legal damage, because he has lost something that he had no legal right to require.

Many great lawyers have questioned this doctrine, which was first enunciated in 1872, but the judges have said it, and humbler mortals must abide thereby.

In cases where the personal factor is not very important, the executors must perform the contract or pay damages.

(e) **Illness** is another way by which certain contracts may be cancelled and discharged. This fact may be put in another way: that if, owing to illness, a man is unable to perform his contract, he is *sometimes* excused. These contracts are the same kind as those in which death is an excuse for non-performance—namely, contracts into which the personal element largely enters. When the performance of a contract depends upon the personal skill or overlooking of a particular man, his illness, if it incapacitates him from work, is a good excuse for his not doing the work. The case of Madame Poussard (p. 374), the operatic artiste engaged to play the principal part in a new opera, is in point. The lady was physically unable to sing on the first night of the opera, and this was held to be a breach of contract, entitling the theatre manager to engage another lady in her place. At the same time he would not have been able to sue Madame Poussard for not being ready to sing according to agreement, because illness, in the language of the old lawyers, is "act of God," and when you are unable to perform a contract by reason of the act of God, you are excused—unless, that is, you have absolutely and definitely promised to do the thing in any and every event. Serious illness is also an excuse for not performing a contract of service, though the illness itself does not put an end to the contract (*see* p. 99). The same applies to contracts of apprenticeship and partnership. If you have a partner or an apprentice who cannot work owing to illness, you cannot complain, neither can you put an end to the contract, unless the sickness is of a permanent character, or is likely to last a long time. The rule is the same as that explained in the chapter on Mistress and Maid (pp. 98–9).

It is a common thing for schoolmasters to stipulate with parents that the latter shall not remove their children from the school without a quarter's notice. If you have sent little Tommy to a school upon these terms, or even if, without actually saying you agree, you know that the rule exists, and do not protest against it at the time, you are bound, before removing Tommy, to give the notice, or else pay damages. But should Tommy become so ill that it would be dangerous for him to continue at the school, you can remove him without notice.

(f) **Bankruptcy** (sequestration in Scotland). When a man is made a bankrupt, all contracts which impose liability on him are cancelled at once, and he himself loses all his rights under contracts from which he would derive benefit. The latter, *i.e.* the beneficial contracts, all pass to the Official Receiver, sequestrator, trustee, or whoever is selected to manage the bankrupt's estate, and that person can take all steps upon them just as the bankrupt himself could have done. It happens in this way:—Drinkhard fails in business, and is declared a bankrupt. He owes to various creditors about £500 in actual money, and he is under a contract to do some work for Purce, Munny & Co., at a price of £100. He has £30 in cash and stock-in-trade, and various people owe him £70 more. The case in which people ask questions is the one about the contract with Purce, Munny & Co. Let me tell you how that matter stands exactly. The trustee of the bankruptcy has the right either to finish the work and claim the whole £100 for the benefit of the bankrupt's creditors, or, if he thinks the contract is not a good one—that is, not sufficiently profitable to make it worth while to proceed—he has the right to cancel the agreement. He does not get off scot-free, for Purce, Munny & Co. have a claim for damages for non-performance of the contract; and suppose they are able to prove £30 damage, they will become creditors of the bankrupt's estate for £30, making the debts £530 in all, as against £100 assets. After paying expenses, there will probably be about 1s. in the £ for creditors, so that Purce, Munny & Co. will receive 30s. by way of damages for breach of contract.

One kind of contract is not in any way affected by bankruptcy: and that is contracts of personal service, where it is the bankrupt who is to render the service. Thus, if a clerk in an office becomes bankrupt, he does not lose his situation by that fact. Or, again, if Herr Katgut, the violinist, is engaged to play at a series of concerts, and he is declared insolvent, he does not lose his engagement because of his bankruptcy. Another thing about contracts of personal service is, that any money earned by the bankrupt for purely personal services after bankruptcy and before he is discharged (*i.e.* released from a bankrupt's disabilities), belongs to the bankrupt himself, while every other halfpenny that comes to him belongs in law to the trustee, for the benefit of the creditors. Thus, Herr Katgut was engaged to play at a series of four concerts, one in each week in June, at £10 per concert. On the 15th of June, when two concerts have been given and two are to come, the violinist is declared bankrupt. If he has not been paid for the first two concerts, the concertgiver can no longer pay him the £20 due, but must hand it over to the trustee for the benefit of the creditors. But the contract continues all



the same, and for the two last concerts Herr Katgut is entitled to be paid himself.

When one is declared bankrupt, one must undergo examination before a competent Court as to the causes of one's bankruptcy. These may be various, ranging from speculation on the Stock Exchange, betting, and extravagant living, to mere accident or misfortune. Now, after the investigation of his affairs has taken place, the bankrupt is at liberty to apply for his "discharge." The effect of a discharge is to set the bankrupt quite free from all debts, liabilities, and contracts whatever to which he was subject when the bankruptcy petition was first presented against him, and also to release him from the control of the Bankruptcy Court. Now, when the bankrupt's assets have realised 10s. in the £—which is a very rare experience—or when the fact that they are less than 10s. in the £ arises from circumstances for which he cannot justly be held responsible, the Court will readily grant a discharge. But when the bankrupt has kept no proper account-books, or has continued to trade knowing himself to be insolvent, or has contracted any debt without reasonable probability of being able to pay it, or has rashly speculated, or has helped bring about the bankruptcy by promoting needless lawsuits, or has been guilty of fraud or fraudulent breach of trust, the Court will suspend his discharge for a certain or an indefinite time. The results of keeping a man in the position of undischarged bankrupt are twofold:—First, the trustee for the creditors may swoop down on him at any time and carry off any property he has. Suppose anyone owes money to the undischarged bankrupt, the trustee can come in at any time and say, "Pay the debt to me, not to him." If the bankrupt brings an action for money he has earned after the petition was presented, the trustee can come in at the end, if the action is successful, and take whatever the Court has awarded. If the undischarged bankrupt's rich maiden aunt should die, leaving her unworthy nephew a legacy, again the trustee may put in an appearance and lay hands on the money. The only thing he cannot touch is money due to the bankrupt for purely personal services. Second, the undischarged one is guilty of a crime if he allows anyone to give him credit for more than £20 without revealing the fact that he is an undischarged bankrupt. And it is a crime none the less even if he obtained the credit without asking and with no fraudulent intention. Even if the creditor offers the credit, the bankrupt has no right to take it without disclosing who he is and what he is.

(g) **Impossibility of performance.** The point whether a man who makes a contract which it proves to be impossible to perform is altogether excused, or whether he must pay damages for not performing it, is one which has engaged the attention of lawyers for centuries. It is curious, in studying ancient law, to find how the same questions that arise in the England of this nineteenth century, also came up for decision in the Rome and the Greece of many decades before the Christian era. Especially does this apply to contracts. We find in the books of Roman legal authors instances given that might be thought to have happened yesterday in Britain. Thus, Gaius (about 120—180 A.D.) puts this case: "If A says to B, 'Will you give so much?' and B answers, 'Why not?' is this a contract?" And he argues that it is, because though the words in their literal

meaning may be argued not to mean "Yes," yet there is no doubt they were intended to bear an affirmative meaning. And it does not matter what words are used, so long as the one party does accept the offer made by the other in words meant to convey an affirmative sense, and understood in that sense by the person to whom they were addressed.

Have we not here a picture of what happens every day in England—a picture of the man who, instead of employing precise and definite terms, uses words which he hopes to be able to twist either way, according as the bargain goes in his favour or against him? And the other man goes to the lawyer and asks the question, "If I asked Smith if he would take my horse and give me £20, and he replied, 'Why not?' is that a binding agreement?"

One of the questions that exercised the minds of ancient Roman lawyers, as it also exercises the wits of their learned brethren of to-day was this: If A brings an action against X for non-performance of a contract, is it a good defence for X if he can prove that the contract was impossible to be performed? Let us note that there is a distinction to be drawn and a difference to be noted between cases where the contract was *impossible from the beginning*—as, for instance, if I promise to sell you a ship which has already gone to the bottom of the sea; and cases where the contract *becomes impossible*—as if I promised on Thursday to sell you a ship, to be delivered on Saturday, and on Friday the vessel is wrecked and totally lost.

Let us first consider those contracts that are impossible of performance at the time they were made. The impossibility may be either physical or legal—that is, the thing contracted to be done either cannot be done at all, in fact—as, a contract to walk from London to Edinburgh in a day—or it may be that the acts contracted to be done are possible to be done, but it is impossible that they should produce the legal effects agreed upon—as, a promise by a married man to marry. He could go through the ceremony of marriage and treat the woman as his wife, but these things would be absolutely useless from a legal point of view, because it is legally impossible for him to marry.

Now, if the thing promised to be done is notoriously physically impossible, and *both parties know it* to be so at the time of the promise, there is no contract. Why not? Because the apparent agreement of the parties is no agreement at all. Again, why not? Because you cannot have an agreement relating to a thing which does not and cannot exist, and which both of you know does not and cannot exist. Neither can you have an agreement as to something to be done, which you both well know cannot possibly be done. You may have an apparent agreement—that is, you may say that you agree; but contract requires, first, a mental assent and agreement, of which the written or spoken word is merely the expression. And how is it possible for two sane persons really to agree that one or both of them shall do something which they know is physically impossible to be done. When I say, "both of them know," I mean, both of them ought to know; or, to put it another way, nine out of ten ordinary average men, taken from any class of life, would know. Thus, if I contract to go to Rome and back in twenty-four hours for such and such a purpose, the contract is void, because it is notoriously physically impossible.



The same with a legal impossibility. If a married man promises marriage to a woman, and she knows he is married at the time, his promise has no legal effect, for the reasons given in the last paragraph.

Now let us consider the question of two persons who make a contract which at the time is impossible of performance, but they are ignorant of the fact. Sometimes he who has promised to do the impossible thing is bound to pay damages for breach of contract; sometimes there is no contract at all. It all depends on the construction of the agreement. If the contract really means that the parties agree to carry it out so far as is possible, then if it was impossible from the beginning, there is no contract. But if a man warrants—that is, expressly promises without reservation—that he *will* do a thing, he must pay if he fails to carry out his agreement.

The distinction is rather fine, and I crave the reader's careful attention to two cases. The first is that of Lord Clifford against W. J. Watts. It appears that Lord Clifford had an estate at Kingsteignton in Devonshire, where, it was thought, there was a large quantity of pipeclay and potter's clay. Watts took a twelve years' lease of four fields from Lord Clifford for the purpose of digging and working this clay, contracting that he would raise from the land not less than 1,000 tons or more than 2,000 tons of pipe or potter's clay in each year of the twelve, and that he would pay a royalty of 2s. 6d. a ton for all that he raised. At the end of the first year, Mr. Watts had not raised 1,000 tons of pipe or potter's clay from the fields—for the very good reason, as the workmen found when they began to excavate the soil, that there was not an ounce of clay of either kind there. Lord Clifford demanded to be paid 1,000 half-crowns; because, he said, "Watts had agreed to raise 1,000 tons a year at least, and pay for them. It might have been a foolish bargain to make, before knowing whether the clay was there, but that was Watts's fault. He took the risk of failure." To this Watts replied, "The contract was impossible to be performed when I first entered into it. I did not know it was impossible, and had no means of finding out, for it is impossible to know whether a particular kind of clay is under a field until you have tried for it, and I could not try until after the contract." Their lordships decided for Watts. They held, that looking on the agreement as a whole, it was a contract for Watts to work and win\* all the clay, up to a certain amount, which happened to be under the surface of the four fields. Therefore, if there was no clay, there was no contract. The clause about taking not less than 1,000 tons at 2s. 6d. per ton, was, said one judge, merely a subsidiary matter. It was simply a method of settling the amount of rent.

The second instance is the case of the Marquis of Bute against Thompson and Forman. The Marquis was the owner of land called the Pwlllywheale Estate, which was, as the orthography would lead one to suppose, in Wales. There were coal mines under this estate, and Messrs. Thompson and Forman agreed to take a lease of these mines for fifty years. The terms were, that the lessees should win and carry away not exceeding 13,000 tons of coal a year, paying to the Marquis 8d. per ton; or "*yielding and paying that amount of money, namely,*

\* *Win* is a technical term amongst miners, meaning, *to dig out or obtain*. Thus, if a miner with his pick and shovel gets out of the mine 2 cwt. of coal, he is said to *win* 2 cwt.

£433 6s. 8d. yearly as fixed rent, whether the coals be worked or not." I have italicised the last words, because they indicate the difference between this case and the case of *Clifford v. Watts*. When Messrs. Thompson and Forman entered upon the Pwllwheale mines, they found them practically exhausted, so that it was impossible for them to get anything like 13,000 tons out of them. But the Marquis of Bute claimed the £433 6s. 8d. per annum all the same, and the Courts held that he was entitled to that amount.

In Lord Clifford's case there was no fixed rent, and the judges were therefore able to say that it was quite consistent with the agreement to say that its meaning was for Watts to pay only for what he was able to win and work, and therefore, to pay nothing if he could win nothing. But in the Marquis of Bute's case, the lessees had strictly tied themselves down to pay £433 6s. 8d. a year, whether the coal was worked or not—consequently they had to pay in any case.

There have been many other cases to the same effect. One was where Mr. Sughrue chartered (hired) a vessel from Mr. Hills, to go to the island of Ichaboe, off the coast of Namqua Land, South Africa, and where Sughrue agreed to load a full cargo of guano. This cargo was to be brought by the ship to Cork or Limerick, at the rate of £4 15s. per ton. The contract contained the usual stipulation, that if it could not be performed owing to "restraints of princes and rulers, act of God and the Queen's enemies, fire and perils of the sea," it should be discharged. The vessel arrived safe at Ichaboe, only to discover that there was not enough guano in the whole island to load a full cargo or anything like it. Sughrue then claimed to be released from his bargain, on the ground that it was impossible for him to perform it. But the Court held that he must pay for a full cargo, because he had promised to do so, and there was nothing in the agreement to show that he ought to be excused if there were not enough guano in Ichaboe to load the ship. In other words, if you make a contract to do something, and bind yourself absolutely to do it, it is no defence to say that the thing was impossible, unless it was known to both of you to be impossible.

It is different where the impossibility is legal. For the contract is void from the commencement if you have agreed to do what is not possible in law. For example, A agreed to sell a piece of land to B. When B's lawyer began to look into the title, he found that the land really belonged to B himself, who had therefore contracted to buy a piece of his own land. I need hardly say that such a thing is a legal impossibility, and it was held there was no contract, although when the contract was made, neither A nor B knew of the facts. Suppose B had *knowingly* agreed to buy a piece of his own land from A, the latter being ignorant of the fact that the land was B's, although B could not possibly carry out the contract, he would have been liable for damages. It is like the case of a married man who passes himself off as single, and promises marriage to a woman. When the latter finds out the cheat she can recover damages for breach of promise of marriage, notwithstanding the obvious fact that the contract was impossible of fulfilment.

Now take the case of a contract relating to the hire or sale of a definite thing. Suppose I contract to let or to sell you my black horse, called The Hermit, and, a few hours before the bargain was made, the horse had died. The best



Scottish authorities are of opinion that the contract is off, because when people contract with reference to a specific article, it is in both their minds that the thing is in existence. And the law of England is the same, as appears from the case of *Hastie & Co.*, corn factors, who had a ship, called the *Kezia Page*, laden with corn, on the way to London from Salonica. The vessel commenced her voyage in February, and on the 15th of May, *Hastie & Co.* made a contract with *Couturier & Co.* to sell the whole cargo to them. But it appeared that the *Kezia Page* had experienced bad weather in the Mediterranean, and early in April was obliged to put into Tunis in distress. On examination, it appeared that the whole of the corn was damp, and must be at once unloaded to prevent it from catching fire; and so the captain of the *Kezia Page* unloaded his cargo, and sold the whole of it by action at Tunis on April 24th, just three weeks before *Hastie & Co.* sold it in London to *Couturier & Co.* To put it another way, it was never possible for *Hastie & Co.* to fulfil their contract, because when they made it, there was no cargo of corn on the *Kezia Page*. The Court of Exchequer exonerated both parties from their bargain.

It is quite different if a man agrees to let or to sell something not specific—for instance, a black horse, not my black horse Peter; or so many tons of wheat, not so many tons now on board the *Saucy Nancy*. An example from the Roman law will explain it:—Julius agrees to deliver to Mævius 100 tons of copper. Julius has not got the copper. Therefore, at the time of the contract he cannot perform it. But he is liable if he does not deliver according to agreement. Why? Because he must procure copper from somewhere, and supply Mævius. It would be destructive of all commerce if a man could not sell merchandise that he had not got. A shopkeeper who accepts an order for 20 lb. of coffee when he has not 20 lb. in the shop has made a good contract. He must hurry to the wholesale dealer and procure enough to satisfy the order. If the law were otherwise, a trader could never agree to sell anything unless he had it in his ownership at the time.

Now let us consider impossibility which arises after the contract has been made: where the performance is possible at the date of the contract, but becomes impossible before the time of performance falls due. Let me say what the rule is, and it is this:—When performance becomes impossible after the contract is made, the impossibility is no excuse, unless it arises by act of God, or by the interposition of Parliament becomes illegal.

William Way had eight children, including a charming daughter, Mary, who was wooed and won by Frederick Jones. Frederick was a careful young man. He made a settlement of some of his property on his intended wife, and then asked her father what he intended to do for her. William Way, remembering his large family, cared not to part with any ready cash, but he satisfied his businesslike son-in-law with the following agreement: "William Way covenants and agrees with Frederick Jones that he, William Way, in consideration of the intended marriage of the said Frederick with Mary, the daughter of the said William, will leave to Mary by his last will and testament one-eighth part of his property, or an equal share according to the number of William Way's children who shall survive him." Frederick Jones married Mary, and

put away the agreement along with the marriage-lines. But William Way had evidently not allowed his large family to worry him, for he lived to a good old age, and even contrived to outlive the fair Mary Jones (*née* Way). And when he died, full of years and honour, he "cut up uncommon well," as they say of deceased millionaires in the City. Judge of the disgust of Frederick Jones when the will was read, and he found that of all the legacies not one was for him. He argued thus: "If my wife was dead, I was not, and the one-eighth ought to have been left to me. If it had been left to my wife, and she had been alive, I should have taken it all"—for there was no Married Women's Property Act at that time of day. "Therefore," said Frederick to William Way's executors, "I am entitled to that share, so you had better hand it over." Sadly but politely, firmly but kindly, the executors declined the invitation. Whereupon Frederick invoked the aid of the Court of Chancery. Before long he wished he had not, for he was told that the contract to leave money to Mary Jones (*née* Way) had fallen through. It had become impossible to leave money to the said Mary, because she had been removed from earth by act of God. Hence Frederick got no legacy, but he gained experience, and I daresay if he ever married again he took care to have a cash dowry instead of the promise of a legacy. Moreover, he would want all the cash he could lay his hands on to pay the lawyer's bill, for in those days the costs of a Chancery suit were grim and great.

The case of Baily against De Crespigny illustrates the saying of an old judge:—"When H contracts not to do a thing which is lawful to do, and an Act of Parliament comes after and compels him to do it, the Statute repeals the contract. So if H contracts to do a thing which is lawful, and an Act of Parliament comes in and hinders him from doing it, the contract is repealed." Mr. Baily let for the term of eighty-nine years a piece of land in Camberwell to De Crespigny, and the latter agreed that he would not build on the land except a summer- or pleasure-house, and a church or chapel. In 1862 the London, Brighton and South Coast Railway Company, wishing to extend their lines, obtained a new Act of Parliament, by which they were authorised to purchase the necessary land, which land included the very identical piece in Camberwell that was let to De Crespigny. The latter sold his lease to the Company, as he was compelled to do, and a very good price they gave him. Then they built a station on that same plot, and Baily brought an action for damages for breach of contract against De Crespigny. In an ordinary way, the latter would have been liable, although he had sold the lease, but it was held that as the Act of Parliament compelled him to sell, and as he could not in any way restrict the Company in their use of the land, he was not liable. There is nothing to prevent people from contracting with reference to a future state of the law. It is done by landlord and tenant every day, when the tenant contracts to pay all rates and taxes that are *or shall be* imposed or levied on the house. But unless the words are clear, we are supposed to make our agreements with reference to the law as it now is.

There is an exception to the rule last given, which applies in the case of a specific thing contracted to be sold or hired. I have said a page or two ago that



when an agreement is made for the sale or hire of a specific thing, the parties are supposed to contract with reference to the existence of that thing at the time, and if it has been destroyed, there is no contract. The same kind of thing applies when it is destroyed between the date of the contract and the time of performance, as the following example shows: Mr. Caldwell agreed to let to Mr. Taylor the Surrey Gardens and Music-hall for four specified nights for the purpose of holding entertainments there. Mr. Taylor went to great expense in arranging his programme. He hired bands, ballet-dancers, and other performers, and engaged people to give displays of fireworks. But "the best-laid schemes of mice and men gang aft agley," and so it proved. For, a few nights before the first of the entertainments was to be held, the music-hall was burnt to the ground by accidental fire, neither Taylor nor Caldwell being one bit to blame for the conflagration. Taylor tried to recover damages for breach of contract, but the Court would not have it. Their lordships said that in law the continued existence of the premises was the basis of the contract, and both Taylor and Caldwell must be assumed to have contracted upon the understanding that the hall should be in existence on the nights fixed.

So, if you agree to sell a picture, to be delivered on the 1st of May to the purchaser, and before May 1 the painting is destroyed without your fault, you are excused, and the contract is discharged. But, except in these cases relating to sale or hire of a specific article or premises, impossibility is no defence unless it is caused by act of God, or by a Statute afterwards passed by Parliament.

I have dwelt on this subject of impossibility at some length, because I have thought it necessary to impress on my readers the familiar maxim, "Do not promise what you cannot perform." The number of cases in the Law Reports of people who have absolutely promised and then have found it impossible to perform the contract, is surprising. Take the case of Mr. Jones, a builder, who undertook to complete certain specified repairs for St. John's College, Oxford, within a certain time; and he also agreed that he would, within the same time, complete any alterations of his work that the architect found necessary. When the work was nearly done, the architect insisted on some alterations, which Jones could not possibly finish within the stipulated time, work as hard as he might. To make the agreement more foolish, Jones had agreed to forfeit £3 a day as liquidated (*i.e.* assessed) damages if he were late. He was late, for he could not possibly be in time; and when the College deducted £3 a day from the price of the repairs, Jones sued them. But he could not win, for he had absolutely bound himself, and when he pleaded that his lateness could not be avoided, and that it was impossible for him to finish in the time agreed on, he was very pertinently asked, "Why, then, did you bind yourself to finish on that day?"

If, as Carlyle put it, the thirty million people of the British Isles are mostly fools, I can only say that the law is out of sympathy with the majority of them. In case after case of the kind I have mentioned above, like that of Jones and St. John's College, the Marquis of Bute and Thompson and Forman (p. 424), Hills and Sughrue (p. 425), and numerous others of which these are only 'types, the judges have said time after time what a pity it is that men will make foolish promises, and bind themselves to do what they may not be or are not able to

carry out. There was no need for Jones to bind himself to alter his work within a time that might prove impossible. There was no need for Thompson and Forman to pledge themselves absolutely to pay £433 6s. 8d. a year for coal that did not exist. There was no need for Sughrue to promise to load a full cargo of guano at a place where guano had become so scarce as it was at Ichaboe. I am sure I do not know why they did these things. The Courts of Law are bound to keep men to their promises, be they never so foolish, or trade would be at a standstill.

It is one of the objects of this book to explain the law on matters of this kind, so that readers will know how to act—not after they have entered into contracts of the kind described, but before. A lighthouse on a dangerous rock is not put there to show the shipwrecked crew the way to swim to land, but to keep them off the rock. Let me give this piece of advice. If you are about to engage in a scheme of a speculative or uncertain kind, such as coal-mining or any other mining, sending out a ship on a speculative voyage, making a time contract, or any other thing where there is a likelihood of your not being able to carry out your contract if certain events do not turn out right—make your promise not absolute, but conditional. I have no doubt the Marquis of Bute would have consented to a clause like this in his lease to Messrs. Thompson and Forman :—

Provided always and it is hereby agreed that if it shall prove impossible, owing to coal not being in the mine in sufficient quantity, for the lessees to win and work 13,000 tons in one year, the lessees shall pay the sum of 8d. per ton only upon such quantity as they are able to win and work.

It would have been safe also in the contract between Lord Clifford and Mr. Watts (p. 424) if the latter had insisted on making his promise to pay a royalty plainly conditional ; as thus :—

It is hereby agreed that if there be no potter's or pipe clay in or under the said land, this contract shall be discharged ; and if there be so little that Watts is unable to win and work 1,000 tons in any year, Watts shall only pay the agreed royalty of 2s. 6d. per ton on the amount won.

This would have put the matter of intention beyond a doubt, instead of leaving it to the judges to determine, by the slow and painful process of arguing the proposition that because no "dead," or "fixed," or "certain minimum" rent was fixed, therefore the parties must have intended that only the clay won should be paid for.

Let me conclude this section by reiterating that an absolute promise is an absolute promise—an obvious truism, but one that does not seem comprehended of the people ; that it is just as easy to make a promise conditional as absolute ; that it is foolish indeed to promise absolutely if you only wish to be bound conditionally ; and that when you make what is in words an absolute promise, the law will not allow you to qualify it by inserting the words "if possible" after the event. Be wise in time, and insert them beforehand.



## SECTION VIII.

## FOREIGN CONTRACTS AND CONTRACTS WITH FOREIGNERS.

Contracts with foreigners enforced by English Courts—Difficulty of suing in Britain anyone who is abroad—When leave will be given to sue a foreign resident—Contracts made with foreigners in England—By what law a contract is governed—Contracts made abroad—Points in connection with foreign law—Contracts by correspondence: where made—The law of the country where contract is to be performed: when it applies—Stamps on foreign contracts.

SUBJECT to what has been said (p. 305) on the effect of war upon contracts with subjects of the hostile State, contracts with foreigners are as good as contracts with fellow-subjects. I propose to consider (*a*) contracts with foreigners made within the jurisdiction of English Courts; (*b*) contracts made abroad, whether with Englishmen or foreigners; (*c*) contracts to be performed abroad, no matter where made. In all three classes questions are often asked by merchants and traders who engage in foreign trade, and I purpose to address myself to the answering of such of the questions as I have found to arise most frequently.

Let me say at once that English Courts of Law are not limited in any way by questions of locality or nationality in deciding disputes relating to contracts. If a Frenchman and a Spaniard make a contract in Germany, the English or Scottish Courts of Law are quite willing and able to decide the dispute, provided the aggrieved party asks them to do so and the other can be found and brought before the Court. The practice in England is to issue what is called a writ, or else a summons by way of beginning a suit, and the writ or summons has to be "served upon," *i.e.* delivered to, the defendant. Now, you can always issue a writ or summons against anybody whatever, for anything you like, if he is to be found in England. The difficulty arises when he is abroad. For the rule is, that you must always go to the forum, or tribunal of the defender—you ought not to ask him to come to yours. Thus, if you wish to take action against a man who is in France, you ought to go to France and ask the French Courts to assist you. So that the main difficulty in enforcing a contract with a man in foreign parts depends not on the fact that the contract was made abroad, or was to be performed there, or that he is a foreigner, but on the fact that he is out of the way, where a writ will not reach him. But there are very many cases when the English Courts will allow you to send him the writ, and demand from him to put in an appearance in England. These are:—

- (1) Where the subject-matter of the action is land within the jurisdiction (*i.e.* England and Wales);
- (2) Where the defendant ordinarily lives within the jurisdiction, and is abroad *pro tem.*;
- (3) Where the action is founded on a breach of contract which ought to have been performed within the jurisdiction, unless the defendant lives in Scotland or Ireland.

In any of these cases you are entitled to leave to send the writ to the man, and ask him to appear in England and defend the action.

Let me take the case (a) of a contract made with a foreigner, but made in England. Such a contract is subject to the rules of English law ; for it is a rule adopted in every country that **a contract is to be interpreted according to the law of the place where it was made.\*** To this rule there is one exception, founded on a principle which runs all through the law relating to contracts, namely, that an agreement depends upon the intention of the people who make it ; and, therefore, if your agreement, though made in England, is evidently intended to be governed by some foreign law, it is governed by that law.

(b) The same observation applies to contracts made abroad. Presumably they must be interpreted according to the law of the country where they are made, but it is always open for you to prove in an English Court that the other party and yourself intended the contract to be governed by English law. This not unfrequently happens. Two Englishmen meet in Paris and begin to talk business, with the result that they eventually enter into some business agreement. Now, except in very exceptional circumstances, the chances are that the two Britons fully intended the transaction to be ruled by English law ; that is, they had no idea of putting themselves under the law of France, of which, probably, they knew nothing. Still, if this contract ever comes to be fought in an English Court of law, one of the parties may, if it suits him to do so, take refuge behind the point that the contract must be construed according to French, not English, law. It will not be difficult, in such a case, to convince an English judge that the intention was to be ruled by English law.

For instance, I knew of a case in which a client was saved from being delivered over to the tender mercies of a Dutch tribunal because at the head of a written agreement he had put the word "London." By thus dating the contract from London, one was able to infer that the parties intended the contract to be construed as though made in London, though it was, in fact, made in Rotterdam. Had there been no indication of the kind, the contract would have been illegal ; for it was an agreement to submit certain matters in dispute to arbitration, and according to Dutch law such agreements are illegal and of no effect.

It is much the best plan to make the matter quite clear ; and to this intent you should insert a clause like this : "It is the intention of the parties that this agreement should be construed according to English [or Scots] law," in contracts made abroad—that is, of course, if such is the intention.

Since contracts made abroad are, in the absence of evidence to the contrary, to be interpreted by the law of the country where they are made, let me call the attention of merchants and traders to one or two matters as to which they ought to be careful. I do not pretend to know the laws of foreign countries, save to a very slight extent, but such experience as I have had has taught me that British merchants often make the mistake of imagining that every law must be like their own. As a rule, it is so in purely commercial matters ; for mercantile law almost all over the world rests upon or has been derived from the usages and practice of merchants. But there are a few points on which one should make inquiry.

\* But see page 434 (c).



*Contracts with married women.*—In these days, married women are frequently traders ; and in England they can make contracts and dispose of property with freedom (p. 23). But it is not so in many foreign countries. In France, by Article 217 of the Civil Code, a wife can, if she be a public tradeswoman, bind herself without her husband's consent ; but in many countries it is not so.

*Minors.*—In every country, people under a certain age are under restrictions as to contracting, and the age varies in different countries. In some it is, as in England, twenty-one—France, for instance ; in others it is the same as in Scotland (pp. 92–3). This is a point to inquire about. Again, in some places the disability of minors is absolute, while in others it is only partial. Thus, in France, by the Civil Code (Article 1308), a minor who is a trader, banker, or workman is absolutely bound by engagements made on account of his trade, business, or work ; but he is not bound by other contracts unless he ratifies them after coming of age.

*Consideration.*—In most European countries, no valuable consideration is necessary to make a contract valid, as it is in England. But in the United States of America the English rules prevail. In many countries a promise to give, which promise is accepted by the other party, is quite legal and binding.

*Contracts for the sale of goods.*—The law of Great Britain relating to the sale of goods is in many respects different from the law on the same subject in foreign countries. American law is the same as British in all essentials. The chief point to be noted is, that in Great Britain as soon as you have *contracted to buy* a definite, specific thing (such as this chair, that table, my gold watch), this thing becomes your property ; but in some countries it does not become yours until it has been *delivered*, and in others not until the *price* is fixed. Another point to be noted is, that in Britain and America you can buy and sell a thing without fixing or even mentioning the price. Thus, if I say to you, "I want to buy your gold watch," and you reply, "Good, I am willing to sell it," to which I say, "Very well, I will take it," and you consent, there is a complete contract of sale ; and as no price was fixed, I must pay you a reasonable, fair price for the watch. But in most European countries—in fact, I think in all of them—there is no contract unless one of two things is done : namely either a definite price is arranged between the vendor and the purchaser, or else they agree to leave it to be fixed by a third party ; and if the latter will not or cannot fix a price, the sale is off.

Again, the laws of some European countries require every contract of sale to be in writing, either drawn up by a public officer (*e.g.* a notary) or signed by the parties themselves. Some such rule is in force in France, where, also, all the expenses of drawing up the contract, and all expenses connected with the sale, are imposed by law on the purchaser, unless the parties otherwise agree.

*Bringing an action abroad.*—It is an almost universal rule that one who brings an action in a country where he does not live, must give security [caution] for the costs of that action. Thus, a French or German resident who comes to England to enforce his rights, must deposit in Court a sum of money to be devoted to the costs of the other side if he (the foreigner) loses. In the same way, if a Glasgow man has occasion to recover a debt against a man in Berlin, he must deposit some security in the Berlin Court, to pay the expenses if the judge should award the German defender the expenses of the suit.

*Seizure of property and person.*—In more than one country in Europe the proceedings in an action against a foreigner differ very materially from those against a subject of the State. The following true story shows what this difference is. An English merchant, whom we will call Mr. Star, had a contract with Messrs. Van Clam (this name is fictitious also) of Holland. Some dispute arose as to the amount of the debt; but this was, apparently, settled amicably by the Dutch firm agreeing to take £50 less than they claimed. Soon afterwards, Mr. Star went over to Holland, and when lunching in a restaurant an officer touched him on the shoulder, asked him if he were Mr. Star, and on receiving an affirmative answer, said, "I arrest you at the suit of Van Clam & Co., for a debt of £50." The Englishman was horrified; but as he had not £50 in cash in his pocket, to prison he was haled. He could have got out again without paying, but it would have taken several days to accomplish the release; and as Mr. Star was not used to prison fare, consisting of bread (very dry) and butter (rather rancid), washed down by the vilest of Dutch tea, he telegraphed to England and procured the £50, whereupon he was released. I hope none of my readers will ever be placed in such a predicament. Anyone who is, ought at once to send to the British Consul, who will procure the best advice and help him out of his trouble.

Another pleasing variety of the same entertainment is the right that exists nearly all over the Continent of seizing a foreign merchant's goods at the very outset of an action. Thus, Saurkraut & Co. of Hamburg have a claim—it may be ever so preposterous and for ever so small a sum—against Smith & Co. of London. Smith & Co. happen to have a thousand pounds' worth of goods at a warehouse in Hamburg, awaiting shipment to England. Saurkraut & Co. may instruct their lawyer to go to the Court at Hamburg, issue a writ (or the German equivalent) for the alleged debt, and at the same time obtain an order to arrest the warehoused goods, which may be of one hundred times the value of the debt claimed. The effect of the order is that the warehouseman dare not allow one bit of the goods to be removed for shipment until the amount of the claim is paid into Court. I need hardly say that the inconvenience caused to Smith & Co. may be enormous, for they may be under contract to deliver those goods in England on a particular day; and it will probably take a day or two to get them out of this kind of legal pawn in which they are held.

In no part of the world does any law exist, I believe—at all events, in relation to commerce—without some reason, and the reason for this exceptionally harsh treatment of foreigners is to be found by looking back to ancient history. The foreign merchant of the olden time was generally a man who attended the chief fairs and periodical markets—such as the great fair of Leipzig and the fair of Nijni-Novgorod, that flourish to this day. He carried his merchandise with him, on horses or mules, and no one knew exactly where he came from. If, during his travels, he contracted a debt or broke a contract, it was of no avail to try to make him liable by ordinary process, for on receipt of a summons he had merely to pack up and move over the frontier. Therefore his creditor was allowed to arrest him and his goods at once, by way of security; for once over the frontier he was difficult to trace, and could not, even if traced, be



made to pay very easily. But what was a necessary protection in the sixteenth century is an anachronism in the nineteenth, when people do not deal with foreigners of whom they know nothing. It is now quite easy for a merchant or trader or anyone else to enforce a just claim in any country, and it seems to me that the seizure of the person and goods of a foreigner is a right that ought speedily to be abolished. It prevails to some extent in Scotland, but in England it has been entirely done away with.

*Bills of Exchange.*—I shall deal with the question of foreign bills in Chapter 2 of this Book.

One further observation I must make under this heading. No doubt it may seem a strange statement to make, but nevertheless it is a fact that it may be a doubtful point as to where a contract is made. This difficulty arises when the agreement is made by correspondence. A in London writes to B in St. Petersburg, offering to sell goods. B replies, accepting the offer. Where was the contract made, in London or St. Petersburg? The question always is, in which of the two places was the act done by which the contract was made binding? From what I have said in the early portions of this chapter (pp. 256–8) it is evident that a contract by correspondence is concluded at the moment the letter accepting the offer is put into the post. Therefore, the place where the letter of acceptance is posted is the place where the contract is made. Be careful, however, to note that it must be a real acceptance, and not a counter-offer. Thus, if A in London writes to B in St. Petersburg offering to buy grain at a certain rate, say, 18s. per quarter, and B replies, "I will take 19s.," that is not an acceptance; and if A replies from London agreeing to the increased price, the contract is made in London.

(c) Contracts to be performed abroad come next for consideration. I have stated the rule to be that contracts are to be interpreted according to the law of the country where they are made, unless a contrary intention appears. Now this rule must always be read subject to the qualification that **a contract which is to be performed entirely in one country** must be interpreted according to the law of the country of performance. Thus, Robertson of Aberdeen makes a contract to buy 1,000 tons of ironwork from Krupp, of Essen in Germany, Robertson to pay the carriage. There are two things to be done to perform this contract, namely, (1) Herr Krupp must deliver the iron, and (2) Robertson must pay for it. In these circumstances, both the things are to be done in Germany; because if Robertson pays carriage, the carrier is his agent—it is just as though he went for it himself—and therefore delivery is made in Germany. And, as I have explained, it is Robertson's duty to go to Krupp with the price, not Krupp's to come to him for it; therefore payment is to be made in Germany. Suppose, then, that any dispute arises on the agreement, it may be decided in an English or Scottish Court, if the parties choose; but it must be decided according to German law, because it is presumed that when a contract is to be performed wholly in one country, the parties intend to be governed by the law of that country. In this case, then, it is not necessary to inquire where the agreement was made.

You should be careful to note that this is only a qualifying rule, and only

applies when the *whole* of the agreement is to be performed in the same country. Therefore, if Robertson's agreement was to pay the money into a certain bank in Aberdeen instead of sending it direct to his creditor, the first rule would apply, and not the qualifying one.

When a contract is made abroad, and is to be performed partly abroad and partly in England, if it is a contract illegal by the law of the country where it is made but legal in England, the English Courts will always presume the intention of the parties to have been to interpret the agreement by the law of England. The principle of the decision is that every contract shall be interpreted in favour of its validity, if possible. So, where the words of an agreement will equally well bear two different constructions, one legal and one illegal, the legal one is always chosen; because everyone is presumed to act legally, unless his conduct will bear no other construction than an illegal one. A case in point is one decided some years ago between a firm of American carriers and some merchants who sent goods to England by those carriers. The contract was made in America, and contained a clause that the carriers should not be liable for the safety of the articles carried, even if these articles were injured or destroyed by the carriers' own negligence. In other words, the goods were to be sent entirely at the owners' risk. Now, such a clause is illegal by American law, and when the goods were damaged, and the merchants brought an action for damages in England, and the carriers put the clause forward, it was argued for the merchants that being illegal by the law of the place where the contract was made, the clause was bad. But the judges decided otherwise; because, the contract being partly to be performed here, and the clause being good here, and as it was to be presumed that both parties intended to be bound by the agreement when they made it, it followed that they must have intended to follow English law, by which the clause was quite valid.

**Stamps on Foreign Contracts.**—In many lands besides England, the revenue laws require contracts to bear a stamp. This is a point to notice when you make a contract abroad. But if you make a contract, say, in Belgium, and by the law of that country the agreement ought to bear a stamp, English Courts will not take any notice of the omission of such a stamp for the purposes of an action in England. It is said, "The English Courts take no account of foreign revenue laws." On the other hand, if you draw up a contract here in writing, and sign it, and send it abroad to be signed by the other party, you ought to have it stamped with the usual stamp here. And for that purpose, if you have not affixed an adhesive stamp before signing, and wish to have an impressed stamp put on at the Inland Revenue Office after it has been returned from abroad, you will be allowed fourteen days after the date of the writing, together with a sufficient number of days to allow of the document being sent by post from the foreign country in question.



## SECTION IX.

## STAMPS.

Stamp when several documents form one contract—Agreements for leases—No stamp required on contract for less than £5—Nor for hire of certain workmen and servants—Nor on agreement for sale of goods or relating thereto—What contracts relate to sale of goods—Stamps on deeds—Consequences of omitting the stamp—Stamps on altered agreements—Cancelling the stamp.

THE subject of stamp laws is not exactly exhilarating, nor is it easy, I find, to discourse upon it in an interesting way. It has very little history, nor is there very much to argue about in connection with it. By the Stamp Act, 1891, every written agreement requires a sixpenny stamp, which may be an ordinary adhesive stamp or an impressed one. Suppose you make a contract by letter, in the manner shown on p. 340, you ought to have a stamp put upon one of the letters—anyone will suffice. I mention this because I once knew a man who had five letters containing an agreement, and he had a sixpenny stamp put on each of them. That gentleman must have been the original "Careful Man" celebrated in song, who "macintoshed his garden up to keep it from the rain."

There are exceptions to the rule above stated. The first applies to **agreements for leases**. The old rule used to be that a lease had to be stamped with an *ad valorem* stamp, increasing according to the rent, but an agreement for a lease only bore the ordinary sixpenny duty. Then some genius discovered that an agreement for a lease was as good as a lease, and so, to save Stamp Duty, solicitors forswore leases, and advised their clients to rely on agreements. Thus the Revenue was defrauded of large sums, for the number of leases had been very great. But the Chancellor of the Exchequer was not thus easily to be jockeyed, and, after two or three attempts to circumvent the solicitors, the law was simplified by the Stamp Act of 1891, by which it was enacted that in future, if an agreement for a lease is made, it shall be stamped like a lease—that is, according to the rent. It sometimes—indeed, often—happens that you first make an agreement for a lease, and afterwards make the lease itself. In that case, as you have stamped the agreement with a lease stamp, you only stamp the lease with an agreement stamp (sixpence); but when you take the lease to be stamped, you must produce the agreement to show that the duty on the whole transaction has been paid.

There are other important exceptions in which **no stamp at all is required** :—

(1) Agreement or memorandum the matter whereof is *not of the value of* £5. This should be carefully read. If the matter of the agreement is worth £4 19s. 11½d. you need not stamp it. But if worth one farthing more, you must pay your sixpence to the Revenue. The value is always the doubtful point in these cases. Take this, for example :—Mr. M. Steinan asked Mr. Semple to discount a £100 bill for him, which Semple did upon the following

agreement being made in writing: "In consideration of your discounting a bill of £100 drawn by J. R. on E. U., payable at one month after date, I hereby undertake and agree if the said bill is not met at maturity to pay your interest at the rate of 1s. in the pound per month till the whole is fully paid and satisfied.—M. STEINAN." A quarrel arose about the matter, and Mr. Semple brought an action against Mr. Steinan, and sought to put in this document as evidence. It was objected that there was no stamp. Semple then contended that he came within the exemption quoted above. He said: "The agreement is not about the bill itself, but only as to the interest to be paid if the bill is not met. That being so, is the interest a matter of the value of £5? Clearly not, because the bill might be met on the day it is payable, and then nothing would be due for interest under this agreement. Or it might be met the next day, and then only a shilling or two would be due." This argument prevailed at the time, but it would not prevail now, because the law then was that if the *agreement was of a certain value* it should pay duty. Now it stands—if it is *less than a certain value it shall not pay duty*. There does not appear to be much difference at first sight, but a little consideration will show that there is more than meets the eye. You can have three kinds of agreements with reference to the Stamp Act—namely, those in which the subject matter is certainly £5 or over; those in which the subject matter is certainly less than £5; and those in which the value is doubtful, as in the case of Semple and Steinan's contract. Under the former law only the first kind paid duty, but by the Stamp Act, 1891, the first and third pay duty, because only those are exempt which are of less value than £5. Therefore, if you do not know how much the matter of the contract is worth, you must pay, because you are unable to say, for certain, that it is not worth £5.

(2) *Agreement or memorandum for the hire of any labourer, artificer, manufacturer, or menial servant.*—This exemption includes firemen and stokers on board ship, who are "labourers" within the meaning of this Act, and also persons engaged in a similar capacity on engines on land. A farm bailiff was held to be a "labourer." But if you employ a gardener to remodel and lay out your garden at a contract price, being a man who employs others to work under him, he is not a "labourer," though may take his share of the labour of laying out the garden. As to who are "menial" servants, *see p. 94.*

(3) *Agreement, letter or memorandum, made for, or relating to, the sale of any goods, wares, or merchandise.*—This exemption has been made in the interest of trade, and has always been liberally interpreted. It has, in fact, been extended to many contracts not for the sale of goods at all, but only connected with such contracts. The legal excuse for such wide interpretation is to be found in the words "or relating to." The following agreements have been held exempt from duty because they "related to" the sale of goods:—

A guarantee for the price of goods sold to another.

An agreement by a broker who bought goods for his principal that he would, for  $\frac{1}{2}$  per cent., guarantee his principal against any loss.

An agreement by the seller of goods to indemnify the buyer against all claims. The document in question was the following:—



To Mr. Thomas Heron.

I agree to purchase twenty-four casks of hams, *etc.*, and you engage to keep me indemnified from any charge or claim Mr. George Langley may fetch against me respecting them.

Yours, *etc.*,

JOHN GRANGER.

But it does not follow that an agreement is always exempt from duty because it has something to do with the sale of goods. It may also refer to something else, and then the stamp must be affixed. For instance, an agreement to sell "the goods and fixtures" in a shop was held liable to duty, because it referred to the sale of something not "goods, chattels, wares, or merchandise." Fixtures, as I have said on p. 167, are accounted part of the house.

The following was held to be dutiable also: "William Finch agrees to take two flies of John South at £60—£5 to be paid down, and the remainder at three months; harness and *goodwill* included." Unfortunately for Mr. South, he omitted to pay his sixpence to her Majesty, and when he had to sue Mr. Finch for the £60, objection was taken to the document for being unstamped. And the objection succeeded, despite the valiant efforts of South's counsel to show that the agreement was one "for, or relating to, the sale of goods." "The main part of the contract," said the ingenious lawyer, "was the sale of the flies. The goodwill was merely collateral"—just thrown in to make weight, as it were—an argument that reminds me of the village "daftie" who went to buy three pounds of potatoes at the general shop. The shopkeeper, however, had run short. "I'm sorry," he said, "but I am two ounces short in weight." "Never mind," replied the simple one, "make it up with 'bacca. It's all the same to me."

Again, when Messrs. Chanter & Co. agreed to allow Mr. Dickenson to use one of their patent boilers, and also to sell him one of the same, and to fix it up in Dickenson's works, they ought to have stamped the agreement, because it related to two things besides the sale of the boiler—namely, the licence to use it and the agreement to fix it up.

A hire-and-purchase agreement should bear a sixpenny stamp, because it is not absolutely an agreement for the sale of goods.

(4) Agreement or memorandum made between the master and mariners of any ship or vessel for wages on any voyage coastwise from port to port in the United Kingdom. This includes fishermen who take a voyage to fish in waters near home, not calling at any foreign port for any purpose whatever, unless driven there by stress of weather.

**A Contract made by Deed** always requires a 10s. stamp, which is called a "deed stamp," and this stamp cannot be affixed by adhesive stamps, but must be an impressed stamp. You can always buy paper ready stamped up to any amount at the Inland Revenue Office; and if you like to execute your contract first, you may have an impressed stamp put on afterwards, provided you do it in a month after the date of the deed. If you happen to be late, the best thing is to send the deed to be stamped at the earliest possible moment, with a petition to the Inland Revenue authorities explaining why you are late, and asking them to be merciful to you. For you are liable to a penalty of £10 for your negligence. As a rule, however, if you can "pitch a good yarn" to account for the delay,

you will be let off with £1 or £2, in addition to the 10s. that ought to have been paid, at first.

The consequences of omitting to stamp a document, or of stamping it with a less amount than the law requires, are painful. You cannot put in evidence in a court of law an unstamped or improperly stamped document. If you try to do so, the registrar of the court, to whom all documents are handed before going to the judge, stops it by the way, and calls attention to the infraction of the Revenue laws. You then have the choice either of not putting the document in evidence at all—which generally means ruin to your case—or of handing the amount of duty, and interest thereon up to date, and £10 penalty, to the registrar, who will obligingly forward the money to Somerset House, and hand your document to the judge.

**Stamps on Altered Agreements.**—When a written agreement is altered, the alteration may be one of two things. Either it is an alteration to correct, so as to make the writing express the real intention of the parties, or it is an alteration of the terms of the agreement itself. The one is merely an alteration in the terms in which the agreement is set down; the other, an addition to or subtraction from the original contract. Examples are not difficult to find. Suppose you have made an agreement to serve J. Smith as his clerk for twelve months, and in writing down the terms of the engagement you call your employer "John Smith," his real name being Jonathan, and you insert the figure 2 instead of 12, your alterations of the writing by crossing out "John" and inserting "Jonathan," and placing a 1 before the 2, are not alterations in the agreement itself, but only corrections of errors of expression. But if, after the agreement has been signed and stamped, you and your employer alter your minds, and resolve on a six months' engagement instead of one for twelve months, and you accordingly cross out 12 and insert 6, you have altered the agreement itself. You must, therefore, have the document stamped with another 6d. stamp, because it is a new agreement; but in the case of a mere correction, no further stamp is required, because there is no new contract—it is simply the original agreement correctly expressed. Thus, where a man insured a "ship and fittings," and stamped the policy, and afterwards he and the underwriter agreed to make it "ship and cargo," the judge decided that although they only crossed out the word "fittings" and wrote in "cargo," the policy required a fresh stamp.

**Cancellation of the Stamp.**—When you use an adhesive stamp, instead of having the document impressed at the Inland Revenue Office, the first person who executes the writing—*i.e.* signs it—must cancel the stamp. Cancellation merely means defacing the stamp so that it cannot be used again; and the best way is for the first man who signs to write his name across the stamp, adding the date. Then no question can be raised as to whether he did cancel it or not. It is quite lawful simply to make a mark on the stamp; but questions may arise as to who made the marks, whereas little doubt can be thrown on the signature and date written on the stamp itself.



## CHAPTER II.

### BILLS, NOTES AND CHEQUES.

The history of bills of exchange and promissory notes—What is negotiability?—What instruments are negotiable?—Instruments not negotiable—What is a bill of exchange?—Difference between bills and notes—Both must be unconditional—Must be written or printed—Signature—Signing not on your own account—Dates must be certain—Amount certain—Mistakes and omissions—The date—Technical terms—Drawer, maker, acceptor, payee, endorser—Different kinds of holders—When due, payable, or overdue—A puzzling question—Duty promptly to present a bill payable on demand—Effect of fraud or illegality—A *bona fide* holder is not prejudiced by the fraud of a previous holder—Dishonour and notice of dishonour—When presentment for "acceptance" necessary—When advisable—The duty of promptness—Go on a business day, at a business hour—What is a good "acceptance"—How to act if the drawee is dead or bankrupt—A partial acceptance—Presentment for payment—How, when, and where—Delay sometimes, but not often, excused—The post—Notice of dishonour necessary—Consequence of not giving notice—Time—Who must pay when a bill is dishonoured—Endorsing a bill or note—Different endorsements—Bills, etc., marked "not negotiable"—Can still be transferred—Rights and liabilities of endorser—Alteration of a bill, note, or cheque—Its effects—Two great cases—Forgery—Lost, stolen, or destroyed bills, etc.—Foreign bills—Stamp duty, British and foreign—CHEQUES—How to overcome the absence of a cheque-book—Cash all cheques promptly—Stale cheques—Crossed cheques—How to make cheques quite safe—General and special crossing—"Not negotiable"—Forged cheques and forged endorsements—Post-dated cheques—Advice to Cockneys—When your banker must honour your cheques—The wily counsel—Overdrafts—When a banker need not honour cheques—When he must not—"Order" and "bearer"—Bank notes.

### BILLS OF EXCHANGE AND PROMISSORY NOTES.

THE history of Bills of Exchange and Promissory Notes is very interesting, as showing how merchants and traders have contrived to overcome one of the obstacles in the way of commerce—the obstacle, that is, occasioned by the difficulty and danger of carrying about large sums of money from place to place. The credit of their invention belongs to the Florentine merchants, who were for many years the bankers of Europe. The promissory note is, perhaps, the oldest form of this kind of document. The Italian *campsores*, or travelling merchants, passed about from fair to fair, buying and selling, and it was customary for these men to give notes, payable at a future date, in settlement of the balance due at the end of the fair. Thus, a merchant going to Holland, and making a purchase of woollen stuffs to a large amount, might be unable to pay in cash for one of two reasons: he might not have sufficient money with him, owing to the inconvenience and danger of carrying large quantities of money from country to country at a time when all transport was carried on by beasts of burden, and when the roads were infested by robbers, from the freebooting baron to the plebeian outlaw; or the buyer might not own

sufficient money in the world to meet the payment. He might be carrying on his business on credit, relying on the proceeds of the sale of the woollens to pay the Dutch merchant from whom he bought.

The Florentine merchants, then, hit upon the plan of making payment by means of notes and bills. The note would be to this effect: "I promise to pay Jan van Dunk 2,000 marks on the second day of the Fair of Ghent." The idea was that by the second day of the Fair of Ghent the Florentine would have disposed of the goods, and so would be able to meet his note. Thus, if he sold for 2,500 marks he would be in this position: he started from Florence with little or no money. He transacted his business of buying and selling at the two fairs, paid for what he had bought out of the proceeds of what he had sold, and returned to Italy with his profit of 500 marks. See what a lot of trouble and anxiety he saved himself. Had it not been for this promissory note system he would have been obliged to carry 2,000 marks in coin to the first fair, wherewith to buy, and to re-carry 2,500 marks to Florence from the second fair after he had re-sold. Another way was this: "I promise to pay you, at Florence, three months after date, the sum of 2,000 marks." The person to whom the note was given might possibly be another Florentine, who could demand payment when he got home; but he might be a foreign merchant, who did not want to go to Florence to fetch his money. Now we begin to see the origin of the peculiar features of bills and notes. It became customary for the person to whom the note was given to sell it to another Florentine, who charged a sort of commission for his trouble [discount]; and this is, no doubt, the beginning of what is called **negotiability**.

Observe how it works out. Cellini of Florence goes to the fair at Bruges to sell, say, gold- and silver-work. Mazzini of Florence goes there to buy tapestry. Cellini sells his goods, receiving from various customers 2,000 marks in coin. Mazzini buys tapestry from Van Dunk of Bruges to the value of 1,500 marks, and gives him a note, payable at Florence in three months. Van Dunk does not want to go to Florence to collect it, so he discounts it for 1,450 marks to Cellini. The latter kills two birds with one stone. He saves himself the risk and trouble of carrying 1,450 marks in coin from Flanders to Italy, and he makes fifty marks profit on the discount. Mazzini takes his tapestry to Italy and sells it at Rome, whence he can easily carry the money to Florence; and when he gets there he pays Van Dunk of Bruges by paying Cellini of Florence. Thus, you see, it was essential to the carrying on of his business (1) that Van Dunk should be able to transfer his note to Cellini, and (2) that Cellini should be able to get his money easily out of Mazzini when the latter was in Florence and the three months had expired. To this end the merchants adopted the rule that these notes should be transferable in a simple way. When they were given to the payee or his order, it was sufficient to show that the payee had endorsed it—*i.e.* had written his name on the back of the document. In the case above quoted, Van Dunk had only to write his name on the back of the note and hand it to Cellini, and Cellini at once became entitled to the money from Mazzini. To meet the second requirement the custom was established of making these notes practically indisputable. In



the case of any ordinary sale of goods the seller could only give to the buyer the same right in the thing sold that he [the seller] himself had. But in the case of the sale of one of these notes it was absolutely necessary, in the interests of trade, to make an exception. Cellini would not buy the note if there were a possibility that when he demanded the money Mazzini might set up a counter-claim that he had against Van Dunk. And so the rule was established that the holder of a promissory note could recover the money against the maker of the note, quite apart from any defence or counter-claim which might exist as between the maker and the person to whom it was originally given. This is what is meant by saying that a promissory note or a bill of exchange is *negotiable*, as distinguished from a horse, or a sheep, or an ordinary debt, which is merely *transferable*.

In course of time, promissory notes came into general use amongst traders of all nations, and were, for the most part, enforced by those specially mercantile Courts which were presided over by the heads of the trades guilds, and were concerned with nothing but trade disputes. From promissory notes to bills of exchange the step was not a great one. Bonhomme of Paris owes 1,000 louis d'or to Bull of London. Bull wants to purchase 1,000 louis' worth of stuff from Porthos, also of Paris. How much easier for him to order Bonhomme to pay Porthos, than to send 1,000 louis over from London, and bring back 1,000! Like the promissory note, the bill of exchange was primarily intended to be used by merchants as a mode of avoiding the necessity of carrying large sums of money from place to place. From the invention of the bill of exchange commerce received an enormous stimulus, and modern banking began. For certain men of capital began to make it a business to deal in bills of exchange, in this way: Rousseau of Paris, wishing to trade with London, would deposit money in the hands of Dargent of Paris, a well-known wealthy trader, and would "draw" on Dargent for the amount. That is, he would draw up an order: "To Monsieur Dargent. Pay to John Bull or his order, 1,000 gold louis. ROUSSEAU." Dargent would put his name across the face of this document, to signify that he would obey the order. Then Rousseau would give John Bull of London this paper instead of cash; and Bull would take it, relying on the credit of Dargent. But Mr. John Bull did not want to go over to Paris to collect the money from Dargent. And there was no need for him to do so, for in Lombard Street he would find Munnibags, the goldsmith, willing to buy the bill from him—charging a small discount for the same. Munnibags could collect the cash more easily than Bull, because he knew that Dargent of Paris would also have bills drawn on him (Munnibags), and so these two primitive bankers could strike a balance.

In England, for many years, the only bills recognised as enforceable at law were bills drawn by or upon foreign merchants. Although foreign bills were known in England at least as early as Richard II., yet it is not until Charles II. that we find any mention in the Law Reports of an inland bill—*i.e.* a bill drawn by one resident Englishman on another, in favour of a third. The judges, as their manner is, were very slow to admit these new-fangled inland bills; but allowed them at first, if the plaintiff could prove that a custom existed between the towns

where the drawer and the drawee lived, to draw and accept these bills. Soon afterwards, inland bills were accepted and drawn at pleasure, but always provided that the parties were merchants or traders. Said the Courts of that time, "A bill of exchange is an instrument of commerce, deriving its attributes entirely from the usage of merchants. It cannot, therefore, be used except by traders and for commercial purposes." There is a record, even, of a case where a man who described himself as "gentleman," brought an action on a bill of exchange, and the judges dismissed the case on the ground that a "gentleman" could not have any rights under a bill of exchange. But in course of time this restriction also was removed, and anyone could draw, accept, endorse or hold a bill, whether he were a trader or not.

To-day, the number of bills afloat must be enormous. Traders use them as a means, chiefly, of carrying on business on credit. Borrowers sign them as security for money lent. They pass from hand to hand with the utmost freedom. A bill with one or two good names on the back of it is regarded as almost equal to coin, and will be tendered in payment with the utmost confidence. In fact, the bills of exchange and promissory notes afloat at the present time represent a sum which amounts, probably, to half the coined money of the world. They are really a kind of private money, easy to carry, unsafe for the dishonest man to steal, and an untold boon to merchants and traders of every kind.

As, then, the distinguishing feature of notes and bills is their negotiability, and as this virtue has also, in more modern times, been given to other instruments, it may be well, before dealing with Bills, Notes and Cheques specifically, to consider **Negotiability and the instruments to which it applies.** As I have said already, negotiable instruments derive their distinguishing features from the law merchant. And the law merchant of Great Britain is neither more nor less than a number of business usages, universally adopted by traders for the convenience of business. Whenever any particular course of business becomes firmly established amongst traders, British courts of law will enforce it as part of the law of the land, so long as the usage is not unreasonable, illegal, or contrary to public policy. Now, as negotiability depends entirely upon the law merchant, it follows that any kind of document which is, by the established rule of trade, treated as negotiable, will become so, according to the law of the land.

Before setting out in detail what instruments are negotiable, let me describe and try to define *negotiability*.

As I have previously hinted, and shall afterwards more thoroughly explain, the ownership of a thing cannot, as a rule, be transferred to a buyer unless the seller is either the owner or the owner's agent. The most prominent exception to this rule is the class of things we are now discussing; for negotiability is an attribute or quality by virtue of which the ownership of the instrument passes from one man to another by delivery, regardless of the fact that the man who makes the delivery may not be the legal owner of that which he delivers. In fact, a negotiable instrument is like coin. If you receive a sovereign as part of the change of a five-pound note, it does not matter to you in the least whether the coin was really the property of the man who gave it to you, or not. The mere fact that he gave it to you makes it yours. The shopkeeper who cashed



your note may have stolen the sovereign; but so long as you did not know that the identical coin you received was obtained by larceny, you are not affected by the fact. In other words, by the mere delivery of the sovereign to you, you obtain a better right to it than was possessed by the man from whom you received it. So it is with a negotiable instrument. If it is delivered to you, and you receive it in good faith, you have a good right to it, although the man from whom you got it may have acquired it in the most nefarious way.

The next question to be answered is, What is meant by the phrase "negotiating a bill," or note, etc.? It means the doing of the act whereby the bill, etc., is transferred to another in such a way that the person to whom it is transferred becomes the owner of it, whatever may have been the title of the person who transferred it. Negotiation may be accomplished either by one act or two; for some instruments are negotiated by delivery alone, and others by endorsement and delivery. Take, for example, a bill of exchange in these terms:—

To Mr. George Fitzgeorge, Liverpool.

£100.

London, April 1st, 1897.

Three months after date pay to James Jamieson, *or bearer*, One hundred pounds for value received.

THOMAS THOMSON.

This bill is negotiable by mere delivery without anything else. Thus, if James Jamieson wishes to negotiate this bill to me, all he has to do is to hand it to me. But suppose you have a bill in this form:—

To Mr. George Fitzgeorge, Liverpool.

£100.

London, April 1st, 1897.

Three months after date pay James Jamieson, *or order*, One hundred pounds for value received.

THOMAS THOMSON.

If James Jamieson wishes to negotiate this bill to me he must endorse it—that is, write his name on it—and then hand it to me. After James Jamieson has endorsed it and delivered it to me, I can negotiate it by mere delivery. That is, it is not necessary for me to endorse it; it will be quite enough if, when I intend to negotiate it to you I hand it to you. At the same time, I do not advise you to take it, and give me cash for it, without my signature—"not," as editors say, "necessarily for publication, but as a guarantee of good faith." If you take the bill from me without my signature on it, and Fitzgeorge, Thomson, and Jamieson, the three men whose names are on the bill, are unable to pay, you cannot get the money from me; but if I have endorsed it also, you can come upon me in default of them.

Besides Bills, Notes and Cheques, there are other instruments which have become negotiable by the usage of merchants and traders, mostly in modern times, for, as I have already stated, a well-defined and general usage of merchants can make any document negotiable unless it is unreasonable that it should be so. The following instruments, amongst others, have been held negotiable: bank notes, which are really promissory notes payable to bearer; Exchequer bills in blank, which are bills of credit issued by the Government through the Lords

of the Treasury for temporary loans from the Bank of England [There are considerable dealings between the Bank and the Treasury almost every day; and when the Treasury receives money from the Bank, these Exchequer bills are given in exchange, entitling the holder to be repaid from the Government funds. They are a very safe but not very remunerative form of investment—very often bearing no more than 1 to 1½ per cent. interest]. The scrip of a foreign loan, payable to bearer, is, by the custom of England, treated as negotiable by bankers, money-lenders, and stockbrokers.

In 1876 a very great controversy arose upon the last-mentioned kind of security. The Russian Government wished to raise a loan of £15,000,000, and, as the custom is, put the matter into the hands of a firm of bankers—this time the firm being Messrs. N. M. Rothschild & Sons, London, and De Rothschild Brothers, Paris.

The loan was divided in portions of £100 each, £20 payable at once, and the other by instalments, and each lender of £100 received what is called a scrip (which simply means *a writing*), in this form:—

Imperial Government of Russia. Issue of £15,000,000 sterling, nominal capital, in 5 per cent. Consolidated Bonds of 1873. Negotiated by Messrs. N. M. Rothschild & Sons, London, and Messrs. De Rothschild Bros., Paris. Bearing interest half-yearly, payable in London from 1st of December, 1873.

Scrip for £100 stock, No. . Received the sum of £20, being the first instalment of 20 per cent. upon £100 stock; and on payment of the remaining instalments at the period specified, the bearer will be entitled to receive a definite bond for £100, after receipt thereof, from the Imperial Government.

London, 1st of December, 1873.

The instalments having been paid, each lender received the bond mentioned, the important part of which was: "The *bearer* of this bond is entitled to £100 sterling, with interest at 5 per cent., which will be paid on presentation of the coupons hereunto attached." You see, the bond was not made payable to a particular person, but to bearer; and it was customary in financial circles to treat these documents in the same way as promissory notes payable to bearer—that is to say, as being negotiable by delivery merely. Nor was this contested until 1876, when a man named Goodwin bought two of them through a broker, and, instead of taking care of the bonds himself, left them in the hands of the broker. The latter dishonestly took them to Robarts's Bank, represented them as being his own, and obtained a loan on them. Messrs. Robarts had no knowledge but that the bonds were the broker's private property. But in course of time Mr. Goodwin turned up and claimed them. He said: "These bonds are mine, and I gave the broker no instructions to raise money on them. Please hand them over." The bankers replied: "These are negotiable instruments. They were negotiated to us in good faith, and we gave value for them. We are, therefore, entitled to retain them." If the bonds were negotiable, Messrs. Robarts were right; if they were not negotiable, Mr. Goodwin was right.

The case went to the House of Lords, and was fought with great learning and skill by Mr. Benjamin, the well-known American lawyer, who, having



been obliged to quit his own country in consequence of the part he took in the Civil War, came over and acquired fame and wealth at the Bar of the Mother Country. Mr. Benjamin urged that the only two points in favour of the bankers were: (1) That the bond expressed itself as payable to bearer; and (2) that "it is and has been the usage of bankers, money-dealers, etc., to buy and sell such scrip and to advance money upon it, and to pass the scrip upon such dealings by mere delivery as a negotiable instrument." He proceeded to argue (1) that the mere fact that the bond is expressed to be payable to bearer does not make it negotiable. In this he succeeded, for it is good law that you cannot make negotiable by your own will what was not negotiable before. But on the second point Mr. Benjamin lost. He argued that bills, notes and cheques were negotiable by the usage of merchants—the general usage of all kinds of traders; but these bonds had only been treated as negotiable by one or two classes—stockbrokers, bankers. and money-dealers. The House of Lords held that this was quite enough. If it was generally done amongst the kind of people who had most dealings with such bonds, the usage became part of the law merchant. Nor was it necessary for the usage, like a custom, to date from time immemorial (p. 330). Therefore it was held that Messrs. Roberts & Co. had a good right to the two bonds, though the person from whom they took them had no right to deposit them. This will give you a very good idea of the value and virtue of negotiability, for if the bonds had not been negotiable, the bankers would have had to bear the loss that in this case fell upon Mr. Goodwin.

A case showing the limitation of the doctrine that the usage of business men can make an instrument negotiable was that brought by Mr. Picker against the London and County Banking Company. Mr. Picker was the owner of some Prussian Government bonds, drawn up very much in the form of those in the last case—that is, payable to bearer. There was also a separate sheet of coupons, upon the presentation of which the bearer was entitled to interest. One day, when Mr. Picker was on a journey, bearing his bonds and coupon-sheet with him, someone stole the bonds, but left the coupon-sheet behind. The thief sold the bonds to A B, who took them to the London and County Bank, and deposited them there as security for a loan. Mr. Picker ultimately traced his property, and demanded it from the bank; but the latter answered that as these bonds were negotiable instruments, and as they (the bank) had advanced money on them in good faith, the claim was not a good one. Mr. Picker brought an action. The bank called evidence from Prussia to prove that in that country bonds of this kind were negotiable; but an English stockbroker testified that by the usage of business men in England the bonds were only negotiable along with the coupon-sheet. The Court of Appeal decided in favour of Mr. Picker, by holding that in English Courts the English rule must prevail; that the bonds by themselves were not negotiable; and, therefore, that the bank must give them up. If the transfer to the bank had taken place in Prussia, the decision would have gone the other way; for, as I shall show presently, when a question arises as to whether an act in relation to one of these instruments is legal or not, the answer depends on the law of the

country where the act was done. "The question is," said Lord Justice Bowen, "whether this right could be passed at law, so far as English law is concerned, otherwise than by virtue of some Statute or custom of merchants prevailing in this country. True," said the Lord Justice, "there is evidence that such instruments form part of the mercantile currency of Prussia. But is evidence that an instrument or piece of money forms part of the mercantile currency of another country any evidence that it forms part of the mercantile currency of this country?" Of course not. You might just as well say that because the dollar is legal currency in America, therefore it is legal currency in Great Britain. So that to make an instrument negotiable in England you must prove a usage amongst English business men: to make it negotiable in Scotland, a Scottish business custom.

It has been held that a scrip certificate to bearer is negotiable. The one upon which dispute arose was in this form—the form of most of them:—

This is to certify that the sum of £10 per share has been paid in respect of the above shares, and that after payment of the undermentioned further instalments to the London Joint Stock Bank, Princes Street, London, the *bearer* hereof will be entitled to be registered as the holder of ten shares of £20 each in the Anglo-Egyptian Bank, Limited.

Four of these scrip certificates, the property of a Mr. Rumball, were left with a Mr. Crossley, who fraudulently used them for his own purposes by depositing them with the Metropolitan Bank as security for a loan. Then Crossley levanted, and Rumball brought an action against the Bank to recover the certificates. But there was overwhelming evidence of an English custom to treat such documents as negotiable, and the Bank, having taken them *bond fide* and for value, was held entitled to retain them.

Egyptian Bonds, Preference Shares in the Pennsylvania Railway Company, and New South Wales Bonds, all payable to bearer, have also been decided to be negotiable instruments by the usage of business men in England.

The following instruments, which are commonly transferred by merchants from hand to hand, have all been held to be **not negotiable** in the strict sense or the term:—A *dividend warrant* entitling the person named therein to receive dividends on Consols: "Pay to Joseph Ashby Partridge £37 10s. for half a year's annuity which becomes due, etc." It was held that as this document contained no words of transfer—*i.e.* it was not "Pay Partridge or order," or "Pay Partridge or bearer," it was not negotiable, though there was plenty of evidence to show that it was customary amongst bankers, etc., to treat it as negotiable. This shows that when a document is in itself and on the face of it not transferable, it cannot be made negotiable by usage, because usage cannot alter the nature of an instrument so as to make it essentially unlike what it was before. In other words, there must be something in the instrument itself to justify its being treated as negotiable—something for the usage to found itself upon.

The Court of Session and the House of Lords also decided that an *iron scrip note* was not negotiable. It was in these terms:—

I will deliver 1,000 tons of iron when required, after 18th September next, to the party lodging this document with me—[*i.e.* to bearer].

WILLIAM DIXON,



Although this instrument was in favour of the bearer, whoever he might be, it was held not negotiable because there was no evidence of a general and well-established usage.

For practical guidance you make take it as a rule that it is not safe to treat a document as negotiable unless it contains words of transfer. As, for instance, a share certificate like this: "Mr. Williams is entitled to — shares of the Blank Railway," and then "——— do hereby transfer the above shares to \_\_\_\_\_ for £ \_\_\_\_\_ received." This is what is called a blank transfer form; but it is only of use to Mr. Williams, the owner of the shares, and only he can fill it in; because the share certificate itself says that Mr. Williams, not Mr. Williams or order, nor Mr. Williams or bearer, is entitled to the shares. In other words, there is nothing in the document to show that it might have been intended to pass from one person to another in the same way as a bill, note, or cheque.

A Postal Order is not negotiable. Therefore if you buy a stolen or lost one, and cash it at the Post Office, you must return the money.

Many people think that bills of lading, dock warrants, delivery orders and wharfingers' certificates are negotiable. They are not. They can be transferred by endorsement, just as bills payable to order can, but the transfer does not carry with it the same virtue as the transfer of a really negotiable instrument. The great advantage of negotiability lies in the fact that a purchaser for value and in good faith need not trouble his head as to the right of the person from whom he received the instrument. But the transferee of a bill of lading, etc., can have no greater or better right to the goods than had the person from whom he took the transfer. So that if you buy a bill of lading from a man who has stolen it, you have no more right to it, or to the goods mentioned in it, than he had, and his right, to use an expressive Abraham-Lincolnism, "would not fill the watch-pocket of a grasshopper."

I shall deal with bills of lading, dock warrants, etc., in the chapters on "Merchants" and "Carriers."

The law relating to Bills of Exchange, Cheques and Notes, is the same in all parts of the United Kingdom. In 1882, an Act of Parliament was passed to codify the law on this subject, and, pursuing the policy that has been followed ever since the Union—that is, of unifying the commercial law of the two countries—the Legislature enacted that the Statute should apply to England and Scotland alike. That Act, called the Bills of Exchange Act, 1882, was the first of a series of codifying and consolidating commercial Statutes, others of which—the Partnership Act and the Sale of Goods Act—will call for subsequent notice.

**What is a Bill of Exchange?**—The Act defines it as "an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer." It will, I think, be more convenient if, before I explain this definition, I set forth the requisites of a **promissory note** according to the same Act. A promissory note is "an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed

or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer."

You will observe what a slight difference there is between the two things. The bill is an order addressed by one person to another, requiring the latter to pay money. The note is a promise to pay money. It may be expressed thus: if Dugald McDougal orders (in writing) Saul Smith to pay £100 to Jeremiah Jenkins, that is a bill of exchange. You see, the man who makes the bill is not the one who is to pay the money. But if Dugald McDougal writes: "I promise to pay Jeremiah Jenkins £100," that is a promissory note. The following are samples of these documents:—

*Bill of Exchange.*

To Mr. Saul Smith, Liverpool.

£100.

London, April 1, 1897.

Three months after date pay the sum of One hundred pounds to Mr. Jeremiah Jenkins, or order, for value received.

DUGALD McDOUGAL.

*Promissory Note.*

£100

— London, April 1, 1897.

I promise to pay to Mr. Jeremiah Jenkins or bearer One hundred pounds for value received.

DUGALD McDOUGAL.

The above bill is payable to Jeremiah Jenkins or his order; the note is payable to bearer. Now let me take the statutory definitions of these instruments in detail, so as to show exactly what is necessary to make a good or valid bill or note. In the first place, there must be an *order* or *promise* to pay. At first blush one would hardly think it possible for there to be a dispute as to whether or no a particular writing is an order or a promise. Nevertheless, disputes have arisen on this point. Probably the most curious document ever sued upon as a promissory note was the following:—

John Mason, 18th February, 1836, borrowed of his sister M. A. M. the sum of £14 in cash as per loan, in promise of payment of which I am truly thankful for and shall never be forgotten by me, John Mason, your affectionate brother, £14.

The somewhat involved expressions of gratitude, pecuniary indebtedness and fraternal affection cost Mr. John Mason a lawsuit, thus showing the folly of mingling considerations of gratitude and affection with affairs of business. For, the sister "M. A. M." having negotiated\* the document—which she could not do unless it were a bill or a note—a Mr. Ellis, to whom it was negotiated, brought an action for the £14. John Mason denied that it was a note at all, and said it was a mere acknowledgment of the debt; but, on the strength of the words "in promise of payment of which," the Court held it to be a note—a promise to pay on demand, in fact.

But the two following documents were decided not to be notes:—(1) "I have received the sum of £20, which I borrowed from you, and I have to be

\* See p. 443 for meaning of the terms *negotiate* and *negotiability*.



accountable for the said sum with interest." (2) "I O U £45 13s., which I borrowed of Mrs. Melanotte, and to pay her 5 per cent. till paid. ROBERT TEASDALE." No. 1 was held to be an agreement to repay a loan; No. 2 an acknowledgment of a debt, merely.

The next thing to be observed is that the order or promise must be **unconditional**. Upon this part of the definition very considerable controversy has arisen. The true meaning of the word *unconditional* in this connection is that the money must be payable at all events. If on the face of the document it is subject to any condition precedent or subsequent (*see* p. 373), or is to be payable at an uncertain time—*i.e.* a time which may never arrive—or is to be payable out of an uncertain fund—*i.e.* a fund which has no present existence and may never exist; or is payable out of a particular fund—it cannot be either a bill or a note. I do not say that such a document would be altogether valueless, for it would, no doubt, be worth much as evidence of a debt and of an agreement to pay. But it would not have the peculiar handiness and other characteristics of a bill or a note.

The following are examples of conditions:—A document of this kind: "To Mr. George Gray. On demand, pay William Wagg or order the sum of twenty pounds if the ship *Nancy Lee* arrives safe at the port of Liverpool." Here you have a distinct condition precedent, because the arrival of the *Nancy Lee* is to precede the payment of the money. Again, you might write: "Three months after date pay to Thomas Toots or order one hundred pounds for value received, unless within that time I complete the ship that I have undertaken to build for the said Thomas Toots." The last clause is a condition subsequent, because there is a present liability to pay the £100, which liability will be discharged if you fulfil your contract to build the ship within the three months. Neither of these documents is a good bill of exchange within the meaning of the Act of Parliament.

The condition may also refer to the time at which the bill is to become due—as, for instance, "I promise to pay Ezra Este one hundred pounds for value received a week after I receive payment from John Jones for the picture I am now painting." This is not unconditional, because John Jones may never pay you. The Bills of Exchange Act goes on to say, "An order to pay out of a particular fund is not unconditional" within the meaning of the Act; but "an unqualified order to pay, coupled with an indication of a particular fund out of which the drawee [*i.e.* the person who is ordered to pay] is to reimburse himself, or a particular account to be debited with the amount, or a statement of the transaction which gives rise to the bill, is unconditional." This section of the Act has proved a stumbling-block to many; but if you read it carefully you will find it not difficult to decipher. If you write "Pay the sum of £10 out of the proceeds of the sale of my furniture," or "out of the money due on balance of account," it is a conditional order to pay, because you do not absolutely order the drawee to pay the money in any event, but only so far as the fund mentioned is sufficient. And although there may be plenty of money in the fund to make the payment, yet, because the direction to pay is restricted to that fund, the order is not a good bill.

Equally, if you give what purports to be a promissory note in these terms, "I promise to pay to John Jones or order £100 out of the legacy given to me by my grandfather," this is not a promissory note at all, because it is not a promise to pay in any event, but only if your grandfather's legacy is sufficient to meet the demand. Understand, the promise is a perfectly good one, but the document cannot be treated as a promissory note.

When, however, you write, "Pay John Jones or order £10 and charge the same to my account," or, "Pay John Jones or order £10 and deduct the amount from the proceeds of sale of my furniture," it will be a valid bill of exchange. You see, the order to pay is absolute, and if the drawee accepts the bill, he absolutely undertakes to pay it. The latter part of the document merely tells him how he is to repay himself, not how he is to pay Jones.

The difference between "Pay John Jones out of the money standing to my account £10," and "Pay John Jones £10 and charge it to my account," is this: if John Jones goes to the drawee with the first bill, and the drawee undertakes to pay it, or, in technical language, "accepts" it, which he does by writing his name on the back, he has only agreed to pay the £10 if he has that amount of yours in hand when the date of payment arrives. But if he accepts the second bill, he has undertaken to pay it in any case, though he anticipates being able to repay himself out of money of yours in his hands. It is for this reason that the first is not a bill of exchange, while the second is.

Next we should note that the order or promise is to be in *writing*. This includes printing; and a bill or note may be wholly written or wholly printed, or partly written and partly printed. *Signature* is also required. As to this, I would say that the signature may be on any part of the note or bill, that a person unable to write may make his mark, and that a corporation, which cannot sign, may affix its common seal instead. It is not absolutely necessary for the signature to be in the handwriting of the drawer of the bill or the maker of the note. You may, if you please, give another person authority to sign a bill or note for you; and in that case he may sign your name, and you will be bound by it just as though your pen had written the name. I hardly advise anyone to trust a servant or agent with authority to sign bills or notes, however reputable and trusted that servant or agent may be. It is dangerous even to give any agent authority to sign one particular bill or note, because if you allow anyone with whom you do business to know that the agent had your authority to sign one such document, he may accept the agent's signature to another which the latter had no authority to sign, and you *may* possibly be liable to pay it. To allow anyone to put your name to a bill, cheque, or note is putting temptation in that person's way, and it places your credit at his mercy to an extent much too great to be comfortable.

**Signing as agent, or per pro., or as director, executor, etc.** It happens to the business man, not infrequently, that he is called upon to put his signature to a bill, not for his own benefit, or on his own behalf, but in a representative capacity, or as agent. The case arises in this way: Evans of Swansea is the Welsh correspondent and agent of Bulyon & Co. of London. One morning he receives a telegram: "Bulyon to Evans. Buy 2,000 tons coal



immediately and draw on Morgan, Cardiff, in our name at three months." Mr. Evans proceeds to execute the commission by going to King, Cole & Soal, colliery proprietors, and bargaining for the coal. Then he draws a bill, like this:—

£420 os. od.

Swansea, March 2, 1898.

Three months after date pay to the order of Messrs. King, Cole & Soal the sum of Four hundred and twenty pounds sterling for value received.

To Mr. Lewis Morgan, Merchant,  
at Cardiff.

DAVIS EVANS,  
*per pro.*  
BULYON & Co.

On this signature Mr. Davis Evans cannot be made personally liable. The words "*per pro.*" are an abbreviation of "*per procuracionem*," and mean "as agent for and on behalf of." So that when King, Cole & Soal take the bill, they know that Evans is not professing to be personally responsible for its payment.

But it sometimes happens that an agent signs that which he has no authority to sign. Therefore, when anybody offers to give you a bill, signed by himself *per pro.* another, it is safest to say, "Will you please let me look at your authority to sign?" If not, serious consequences may arise. Suppose, for example, that Mr. Davis Evans, without the least bad intention, draws a bill "To Mr. David Davies" instead of on Morgan. When this comes to the ears of Bulyon & Co., they repudiate their liability, as they have every right to do, because they said, "Draw on Morgan"—not a word about David Davies. And King, Cole & Soal have not a word to say against Bulyon & Co. For Evans signed "*per pro.*," and they ought to have asked to see his authority. If they chose to dispense with that formality, it is their look-out.

Take another case: Evans signs, "Davis Evans, Agent." What does that mean? Perhaps Evans meant it to mean that he signed the bill as agent for someone else, and did not accept any personal responsibility; but that is not what it means in law. "Is it not the universal rule," remarked a judge, "that a man who puts his name to a bill thereby makes himself personally liable, unless he subscribes it for another, or by procuration of another, which are words of exclusion? Unless he says *plainly* 'I am a mere scribe,' he is liable." Therefore, Evans will be liable, if he merely adds "Agent," or even "Agent for Bulyon & Co.," for these are words describing his business, just as I might sign, "F. Loryer, Barrister-at-law." He must sign in [such a way as to show that he is signing as agent, and does not personally undertake to pay. Thus, if he signs "For Bulyon & Co. D. Evans," that will do.

Where Smith was the holder of a bill, payable to Smith or order, and he died, leaving Mr. Monius his executor; and Monius, wishing to discount the bill for cash, endorsed it, "Monius, executor of Smith," Monius was held personally liable. He should have said, "Monius, executor of Smith, without recourse to me personally," and then he would only have had to pay out of the estate of Smith, so far as it went, and not out of his own pocket.

Take, again, a note :—

We promise to pay £100, etc.

X Y	}	Directors of the Gold Mining Co., Ltd.
Z W		
J B		

X Y, Z W, and J B are personally responsible to pay the £100, though it was money lent really to the Gold Mining Company, and not to those persons for their own use.

A hard case was that of three worthy members of the Reformed Presbyterian Church of Stranraer. Money was badly wanted for some purpose connected with the kirk, and the three members signed a note like this :—

We, the undersigned, in the name and on behalf of the Reformed  
Presbyterian Church, Stranraer, promise to pay

J. MAC,  
D. MAC,  
B. MAC.

The money raised on the security of this document was applied for church purposes, not a penny of it going into the pockets of the three gentlemen who signed, and there can be little doubt that when they put their names to the paper they thought they would only be liable along with the rest of the church-members. But the Court of Session decided that they had rendered themselves liable to pay the whole amount out of their own pockets.

Moral: Be particularly careful how you affix your name to a bill, a cheque, or a promissory note; and, if you are signing merely on behalf of someone else, be especially careful to say so in unmistakable terms. The safest thing to do is to put "per pro."

The next thing is the *time*. The bill must be payable either on demand or at a *fixed* or *determinable* future time. A very common form of bill of exchange is, "Pay to Blank or order £100 at sight." This is almost like on demand, and has practically the same meaning. Note well that the time must not be uncertain—that is, it must be a time which must certainly come; and if it be that, it is enough to satisfy every requirement of the law. A young gentleman who had great expectations from his father, and borrowed money on the strength of them, giving a note: "I promise to pay Mr. Shylock £100 for value received one month after the death of my father," tried to make out that the note was not a note, because the time was uncertain. But he lost his case, for the judges held that his father being sure to die, the date was determinable. But if a sailor gives a note: "I promise to pay Shylock £10 one week after my ship *The Saucy Polly* is paid off," this is no promissory note, because *The Saucy Polly* may never be paid off at all. She may sink, or her owners may become totally insolvent, or half a dozen other things may happen.

Further, the order or promise must be to pay a *certain* sum of money. If you promise in writing "to pay £10 or deliver ten tons of coal," the document will not be a promissory note, because it is not for the payment of money alone. The same applies to a promise to pay £10 and deliver ten tons of coal. As to the



certainly of the sum to be paid, it should be noted that the amount named in the bill or note must be absolutely fixed, so as not to be the subject of dispute. "Three months after date I promise to pay J. E. £65, with all other sums that may be due to him," though intended to be a promissory note, was not one. Neither was a writing given to the secretary of a Friendly Society promising to pay "£13 and all fines according to rule." The reason, obviously, is that the sum to be paid on these notes is so indefinite that anyone to whom they were negotiated would not know how much was due upon them. It is, of course, quite permissible to provide for the payment of interest. Indeed, interest is always understood to run upon a bill or note from and after the date fixed for payment. You see, if you give a man a bill dated the 1st of April, being an order on your banker to pay £50, with interest at 5 per cent., three months after date, anyone who accepts the bill, or who negotiates it or discounts it, can tell in a moment how much is due. It is also quite legal to give a promissory note for money to be paid by instalments, with interest on every instalment that is not paid promptly. If ever you give a promissory note of this kind, take care when you pay an instalment to see that the holder of the note makes a memorandum of the payment on the back of the document. So will you avoid accidents and save yourself much trouble if the note should come into the hands of another party.

Lastly, we must consider the *person* to whom the money is to be paid. The Act says that the bill or note must be payable to a certain person, or to the order of a certain person, or to bearer. The common forms are those given above—"Pay Mr. John Johnson or order," or "I promise to pay Mr. John Johnson or bearer"—as most of you have seen, I daresay, on bills, notes, and cheques. Sometimes a bill will be made out in this fashion: "Pay Mr. John Johnson £20"—that is, not "Johnson or order," or "Johnson or bearer," but plain "Johnson" alone. And people are very often mystified when they receive such documents. For instance, Johnson will ask, "Is this bill payable to me only, or is it payable to me or order, or to me or bearer?" The answer is not far to seek. Whenever you receive a bill, or cheque, or note payable simply to "John Johnson," it is a bill, cheque, or note payable to John Johnson or order. I ought to say, perhaps, that if the bill, etc., contains words prohibiting transfer, or indicating an intention that the bill shall not be negotiable, then the case is different; for the bill cannot then be negotiated. Thus, "Pay John Johnson only," would make a bill or cheque payable to the payee and to no one else. The rule that a bill, etc., expressed to be payable to a particular person, is equivalent to a bill payable to that person or order, unless there are words expressly prohibiting transfer, is a rule taken from the law of Scotland. Before the Bill of Exchange Act, 1882, a bill, note, or cheque payable "to John Johnson" was, by English law, payable to John Johnson only—that is, it could not be transferred. By the law of Scotland, on the other hand, it was equivalent to a bill to John Johnson or his order; and when the law of the two countries was codified and consolidated, the framer of the Statute, Mr. Chalmers, adopted the Scottish rule as the more convenient of the two.

A second difficulty that often arises in the mind of the average man is when

someone sends him a bill, note, or cheque with the name of the payee omitted altogether ; as, for instance, "Pay                    or order twenty pounds," or "Pay or bearer twenty pounds." The difference is considerable, according as the bill, etc., is to order or to bearer. If I write, "Pay                    or order," that means pay to my own order ; and in order to transfer the bill, etc., to you I must endorse it on the back. But if the words are, "Pay                    or bearer," it is just as though I had written "Pay bearer," and the bill is transferred or negotiated without endorsement. Anyone to whom the bill is delivered has a right to the money.

**The amount of a bill or note.**—In the specimens of bills and notes used by me for purposes of illustration (p. 449), you have doubtless observed that the amount is stated twice over—once in figures, in the left-hand top corner, and once in words in the body of the bill or note itself. Careless people sometimes make mistakes in drawing these instruments, and write one amount in figures and a different one in words. I have seen a bill headed "£100," and going on to say, "pay one hundred and fifty pounds." What is to happen in such a case? Do the words prevail over the figures, or the figures over the words ; or is it a matter upon which the parties may give evidence and ask the judge to decide which of the two was meant to be inserted? The answer is, that the words prevail—a decision which appears to proceed upon the principle that the order or promise is to pay the amount written in the body of the bill or note. Thus, a note runs, "I promise to pay one hundred and fifty pounds"—that is the promise to pay ; and the "£100" in the margin is not a part of the promise. It is merely a marginal note. Moreover, there is less chance of the words being wrong than the figures. It is not uncommon for a man to write £100 when he means £1,000, but he less usually writes "one hundred" when he means "one thousand" or "one hundred and fifty."

There is only one other observation to be made about the amount of a bill or note. A bill of exchange may be drawn for any sum, large or small. But a promissory note, drawn in England [but not in Scotland] for less than £5 is void if it is *payable to bearer on demand*. If it is not payable to bearer, or if it is payable to bearer but at a fixed date, the note may be for any amount, however small.

**The date on a bill or note.**—It is not an infrequent occurrence for a bill or note to be given undated ; and the absence of a date does not in any way affect the validity of the instrument. This is generally done in the case of bills given at longish dates by business houses. In many trades the buyer of goods is allowed a very long credit, and it is usual for this credit to be allowed by the buyer taking bills payable at a future date. Suppose this to be the custom in the sewing-machine trade. Bang & Co. purchase on the 1st of January, 1897, from Squealer & Todd twenty sewing machines at £4 each, at nine months' credit. The wholesale house draw bills on Bang & Co., payable in nine months' time. Bang & Co. "accept" the bills, and Squealer & Todd can turn them into cash by discounting them at a bank—*i.e.* the banker gives cash down for them, less, say, £3, which he charges under the name of discount for the accommodation. Now, the bills may be dated January 1st, 1897, and be expressed, "Nine months after date,



pay, etc.”; or they may be expressed, “On October 1st, 1897, pay, etc.”—the two are exactly the same in effect; in the latter case, a date at the head of the bill is entirely worthless. When the exact date of payment is inserted in the body of the instrument, the date of making is usually left out, for this reason: Bang & Co. know that the bills are likely to be discounted—they do not know to whom—and they do not wish the world at large to know that they are carrying on their business by nine months’ bills. For some reason or other, long-dated bills do not enhance the credit of those who give them. So that, if Squealer & Todd keep the instruments for a few months before discounting or otherwise negotiating them, they are at liberty to fill in any date they like. Why? Because it makes no earthly difference to the various rights and liabilities on the bills, the dates being mere surplusage. They might as well put “fee-fo-fum.”

You can easily imagine cases where a wrong date will make a difference. Thus, if A B accepts a bill, “Three months after date, pay, etc.,” and there is no date on the bill, and the holder fills up a date before the true one, it will make a great deal of difference to A B. Suppose the real date when the bill was drawn to be the 1st of November, and someone afterwards fills in “October 1st,” the bill will, on the face of it, become payable on the 1st of January instead of the 1st of February. In such a case the original payee cannot take advantage of the wrong date; but if the bill comes into the hands of a holder in due course, the latter has the right to consider that the date on the bill is the true date, and can demand the money accordingly. If a bill expressed to be payable so many days, weeks, or months, etc., after date, ever comes into your hands undated, you are justified in inserting what you believe to be the true date; and the date so inserted by you in good faith must be taken to be correct, even if it is, in fact, incorrect. Therefore, if an undated bill comes into your hands, make inquiries from the drawer and the acceptor as to the true date, and insert the date that is given to you. The practical moral of this is, that if a bill is drawn upon you payable not on a fixed day but so long after date, be sure to put in the date upon which you “accept” the bill. If you do not take this precaution, you run the risk of the instrument getting into the hands of someone who will fill in a date prior to the real one, and you will find yourself called upon to pay before you expect it. I insist upon this point at some length, because I have known of so many cases where this elementary precaution has been neglected—sometimes with most serious consequences.

It is important to know **the meaning of the terms used** with reference to a bill of exchange. The person who gives the order to pay is called the “drawer.” He who is ordered to pay is the “drawee,” and the bill is said to be drawn upon him. If the drawee, when the bill is taken to him, expresses his intention of obeying the order—that is, of paying the money—he is said to “accept” the bill, and he does this by writing his name on it—as, for instance, “Accepted, *John Jones*”—and is then called the “acceptor.” The person in whose favour the bill is drawn, *i.e.* to whom the money is to be paid, is called the “payee.” When a bill is negotiated, and the man who negotiates it writes his name on the back, he is called an “indorser,” and the one to whom he so negotiates it is termed an “indorsee.”

Example.—

£100

London, April 1<sup>st</sup> 1896

Three months after date pay to Mr. Samuel Samson or  
his order One Hundred Pounds for value received.

To Mr. John Johnson, Merchant,  
at Manchester

Thomas Thomson

*(Crossed out text: Receipt, Pay to Bearer, Blank, John Johnson)*

Thomas Thomson is the drawer, Samuel Samson the payee, John Johnson the drawee until he wrote the words printed crosswise over the bill, when he became the acceptor. If Samson negotiates, *i.e.* transfers the bill to Michael O'Brien, and O'Brien negotiates it to Flannery, Samson and O'Brien will put their names on the back of the bill, and so become indorsers, Flannery being the indorsee.

The technical terms used with reference to a Promissory Note are similar, except that there is no drawee or acceptor, and that the giver of the note is called the "maker" and not the "drawer." "Payee," "indorser," and "indorsee" have the same meanings as when used with reference to a bill.

**Holder, Holder for value, Holder in due course.**—The holder of a bill, note, or cheque is the person in possession of it, and apparently entitled to demand payment when it becomes due. For instance, if the bill, etc., is payable to bearer, anybody in possession thereof is the holder, because anyone in possession may demand payment when the bill, etc., becomes due. But if you have an instrument payable to "Alias or order," Alias is the first holder, and if he indorses it over to Blank, the latter becomes the holder. The great difference between a cheque, note, or bill payable to order and one payable to bearer is that if the latter kind should be lost or stolen, the finder or thief becomes the holder, and can transfer it to another. Not so with the note, etc., payable to order. The only person who can become the holder of such an instrument is an indorsee—that is, someone to whom the payee delivers it after signing his name on the back. So that it is easy to see how much safer is a bill, cheque, or note payable to order than one payable to bearer; for if you make a bill payable to "Blank or order," no one except Blank can become the holder of that bill until Blank has indorsed it. Therefore, if it is lost or stolen before it is indorsed, it is of no use to anyone.

A holder for value is a holder within the above description who has given valuable consideration for the bill (pp. 277 *et seq.*), or receives it gratuitously through somebody who has given value for it. Thus, Macnaughton draws a bill on O'Toole for £100 in favour of O'Flannigan, not because he owes O'Flannigan anything, but by way of a gift. The payee (O'Flannigan) is not a holder for value,



because he gave no consideration for the bill. He indorses it to O'Brien, who gives him £5 for it. O'Brien is a holder for value. Then O'Brien indorses it and makes a present of it to Mulligan. Mulligan is also a holder for value, because, though he gave no consideration for it himself, he took the bill from someone who had given valuable consideration for it. He, therefore, can demand the amount of the bill from O'Toole (the acceptor), or from Macnaughton (the drawer), or from O'Flannigan (the first indorser). But he cannot enforce the bill against O'Brien, the man who indorsed it to him, because, as between O'Brien and himself there was no valuable consideration.

A holder in due course is one whose position is practically unassailable. He is a holder for value within the meaning of the above description; but he is something more than this. He must have become the holder before the bill was overdue, and without notice of any fraud or illegality which might affect the validity of the instrument, and without notice of dishonour.

This brings us to the consideration of three points, namely—(1) When is a bill, note, or cheque due, payable, or overdue? (2) What is the effect of fraud and illegality upon a bill, note, or cheque? (3) What is meant by dishonour, and notice of dishonour?

(1) A bill, etc., payable on a fixed date is **not due or payable** when that date arrives. By the ancient custom of the merchants, arising nobody quite knows how, the acceptor of a bill or the maker of a note is allowed three days after the bill or note is due, in which to pay. Thus, if you have a bill "accepted" by Samuel Samson, dated the 10th of January, and payable three months after date, the bill is due on the 10th of April; but owing to the allowance of these three days, which are called **days of grace**, you cannot ask Samuel Samson for payment until the 13th of April. This custom obtains, I believe, not only in Great Britain, but in almost every State where bills are used, though the number of days varies in each. I read the other day of one of the American States in which days of grace had been abolished by an Act of the State Legislature. Bills and notes payable on demand are not subject to the three days of grace. Before the Bills of Exchange Act, 1882, there was some controversy amongst merchants as well as lawyers as to whether the days of grace did or did not run upon bills payable at sight. That Statute cleared up the dispute by enacting that no such privilege belonged to these bills, thus placing them on the same footing as those payable on demand.

It may happen that the last day of grace falls on Sunday, Christmas Day, or Good Friday, or on a day appointed by royal proclamation as a public fast or thanksgiving day. On these days the banks are closed and business is suspended, and therefore the holder of a bill or note cannot expect to be paid on that day. The Bills of Exchange Act directs that in such a case the bill shall be due and payable on the preceding business day. The rule is somewhat different with regard to Bank Holidays (other than Christmas Day and Good Friday). Then, also, payment cannot be made on the exact day, because the banks are closed. But instead of the bill becoming due and payable on the preceding business day, payment may be made on the succeeding business day. Again, it may happen that the last day of grace is a Sunday, and the day before is a Bank Holiday or

Christmas Day. If the rule were to prevail as above stated, *i.e.* payment to be demanded on the preceding business day, that would be Friday—two days before the bill is really payable. This contingency is provided for by the Act, which says that payment is to be demanded on the succeeding day.

It works out in this way: If, in the year 1897, you are holder of a bill dated September 23rd, payable three months after date, the three months expire on the 23rd of December. Add the days of grace, and it will take you to the 26th of December as the date of payment. But the 26th is a Sunday. By the rule quoted above as to Sundays, you ought to be able to demand payment on the 25th. But that is Christmas Day. You must, therefore, wait until Tuesday, the 28th, for Monday, being a Bank Holiday (Boxing Day), the banks will be closed.

Let me say that you are allowed to dispense with days of grace when you give or take a bill or note. If someone asks you to take a three months' bill in payment of an account, and three months is just as long as ever you can wait for your money, draw the bill in this form:—

£100

London, April 1<sup>st</sup> 1897

Three months after date (without grace) pay to Mr. John Jink  
or order One Hundred Pounds for value received.

To Mr. James Johnson,  
Liverpool.

Accepted  
James

Thomas Tompkins

Upon such an instrument no grace is allowed.

Sometimes—indeed, frequently—bills and notes are given payable by instalments. Thus, “I promise to pay £100 by equal instalments on January 1st and February 1st”; and it has been contended in the Courts that no days of grace are allowable for instalments—or, at all events, for the first instalment. On one occasion, counsel contended that under a note in the above terms, the first half was due and payable on the 1st of January, though the last might not be due and payable until the 4th of February. But the Court decided against him, and held that where there are several dates of payment fixed by the bill or note, days of grace are allowable in respect of each. Therefore, in the above case, the first instalment could not be claimed until the 4th of January, nor the second until the 4th of February.

Let me say another word or two to prevent mistakes as to the dates upon which bills become due and payable. “Month,” in a bill or note, always means calendar month—not a month of four weeks. So that if you wish to make a bill payable four weeks after date, say “four weeks”; for if you say “one month,” it will mean the corresponding day of the next month. But how if there is



no corresponding day? Suppose I give you a bill dated the 31st of January, "One month after date, pay, etc." There is no 31st of February. Is the corresponding day the last day of February, or the 3rd of March? The answer is, that it is the 28th of February [in leap-year, the 29th], which, allowing three days of grace, will cause the bill to be payable on the 3rd of March. It follows that bills dated the 28th, 29th, and 30th of January, payable one month after date, will all become due and payable on the same day. This reminds one of the puzzling question, "What is the first anniversary of the birth of a man born on the 29th of February?" I have heard people contend for the 1st of March, but they are wrong; it is the 28th of February.

To sum up—month means calendar month. A bill or note expressed to be payable on a fixed date is not due and payable on the date fixed, but three days afterwards; *except* bills or notes "on demand," or "at sight," or expressed to be "without grace."

Now let us see **when a bill or note is overdue**—a point not so easy to answer as you might suppose. To begin with, I ask you to bear in mind what I said on page 142 with regard to rent—namely, that money is overdue the day after it is due. So that a bill due on the 1st of the month is overdue on the 2nd. I think I hear you say, "Well, that is easy enough, at all events." So it is. But let me, as the clown says to the ringmaster, ask you another: *When is a bill or note payable on demand overdue?* This question, in a variety of guises, is a favourite one to set to students of the law at their examinations. And it often proves deadly. It is evidently impossible to apply the same rule to such a bill as to a bill payable at a fixed date. A bill payable on demand is due and payable from the moment it is given; and you cannot say that (for instance) it becomes overdue the day after it is given—because it is just as much due then as it was the first day, and it cannot be both due and overdue at the same time. I am not splitting hairs, nor arguing for the sake of argument, as the old scholiasts did when they discussed the proposition "How many angels can stand on the point of a needle?" For, seeing that the negotiability of a bill or note is seriously affected by the fact of its being overdue, and considering how many bills, etc., "on demand" are in circulation, it becomes of the utmost importance to know when a bill or note payable on demand becomes overdue.

I am sorry to say that I cannot give you a mathematically precise answer to the question. I can give you the rule which will be sufficient, I doubt not, to guide you in 999 transactions out of a thousand. In the 1,000th affair it will probably tell you how to play safety. The rule is, that a bill or cheque payable on demand is overdue when it has been in circulation for an unreasonable time from the date when it was first issued. You see how general the rule is—how indefinite. And it does not make it more certain when you add, in the words of the Act, "What is an unreasonable length of time for this purpose is a question of fact." In other words, whenever a question arises as to whether a bill or cheque has or has not been in circulation for an unreasonable time, it is for the jury to answer the question. And, as everybody knows, a jury can't, like Brer Rabbit, do "what he dern well please." The judge, in directing the jury on the point, will tell them to take all the circumstances of the case into consideration. He will tell them to

note the amount of the bill, whether it was in payment of a debt, whether the parties live in the same place or not, and so on. Diligence is the soul of business, and lack of it always prejudices a party to a lawsuit. In no class of transactions is diligence more essential than in that relating to negotiable instruments; and with reference to bills payable on demand, the rule is that the holder should present them to the drawee for payment with all diligence. I do not mean that the man who takes such a bill is bound to lay aside all other business, and to transmit the bill for payment at once; but he must be quick. One learned writer says that a common bill of exchange payable on demand ought to be presented the day after it is received if the parties live in the same place, and if they do not live in the same place, but the bill has to be sent by post, it ought to be posted the day after it is received by the payee, and presented for payment the day after the post arrives. This has been held to be the law in certain old cases, but nowadays the jury may hear evidence to explain why the bill was presented later, and, if they are satisfied that the excuse is reasonable, may declare that the time was not unreasonable. It comes to this, therefore, that if you purchase a bill payable on demand more than a day or two after its date, *i.e.* after it has been in circulation an unreasonable length of time, you take the bill with all risks, because you are not a holder in due course.

As I have explained (pp. 443-4), when a bill, etc., is negotiated to you, you acquire a right to the money represented by the bill independently of the title of the man who transferred it to you. But this is only the case when you are a holder in due course. If the bill is given to you after it is overdue, there is merely a transfer, there is no negotiation. In other words, you get the same right as the person had who transferred to you, the same as in the case of a transfer of ordinary property. Take this case, for example:—

£20	One month after date pay John Jones or bearer Twenty Pounds for value received To Mr. Richard Roe, Merchant, at Liverpool.	London, January 1 <sup>st</sup> 1897. William Doe.
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This bill will be due and payable on the 4th of February—counting the three days of grace—and overdue on the 5th. Suppose that Mr. John Jones loses the bit of paper, or has it stolen from him, and the finder or the thief—whom you suppose to be entitled to the bill—sells it to you, and transfers it to you, as he can legally do, by mere delivery. It makes all the difference whether you take the bill before it is overdue (*i.e.* up to and including the 4th of February) or after.



If before, then you have a good right to the bill, so long as you did not know it to have been lost or stolen. If after, then you get no better right than the finder or thief had—that is, no right at all. So it really comes to this, that an overdue bill, note, or cheque is not negotiable. It is transferable only.

Apply what I have said to a bill payable on demand. It is overdue after a reasonable time. Therefore, if you take it after a reasonable time, you have no better title than had the man from whom you took it. If it be a lost or stolen bill, you have no title to it. If it were obtained by fraud, or were given for an illegal consideration, you are deemed to have notice of the fact. For the consequences, *see* p. 463.

There is one curious difference between a bill and a promissory note with regard to this question of being overdue. A bill and a note payable on a fixed day are on exactly the same footing, but not when payable on demand. By section 86 of the Act, a promissory note payable on demand is not overdue when it has been in circulation for more than a reasonable time. So that you are safe in taking such a note any time up to six years from the date thereof, unless you have some reason to suspect that it has been lost or stolen, or obtained by fraud, or for an illegal consideration. I frankly confess that I do not know the reason for the difference made between the two kinds of instruments. Baron Parke, a celebrated English judge, afterwards created Lord Wensleydale, said: "A promissory note payable on demand is intended to be a continuing security. It is not like a cheque or note, intended to be presented immediately." One can see that there is a difference between, "*I* promise to pay on demand," and an order to someone else to pay on demand. The first is merely creating a debt against myself. The second is based on the supposition that the one to whom the order is addressed has money of mine in his hands. If the bill be not presented for payment at once, he may contract other liabilities on my behalf—as, for instance, he may "accept" a bill at three months drawn by me on him, and the money will be wanted to meet that bill when the time comes.

*Cheques*, being merely bills of exchange payable on demand and drawn on a banker, are subject to the ordinary rule as to bills payable on demand—*i.e.* they cease to be negotiable, in the proper sense of the word, after having been in circulation more than a reasonable time. In its practical form, this means that it is unsafe to cash a cheque (except for the drawer himself) more than a day or two after its date. If, on the 5th of April, Jones brings me a cheque signed by Smith and dated the 10th of March, and wants me to cash it for him, I should not readily do it, for the reasons given above with reference to bills. The cheque might be all right, but, on the other hand, it might not, and I should have to take the consequences if anything were wrong with it. The cases on the point of "reasonable time" vary considerably. In several of the older cases it was cut down to a very short period—as in the case of a Mr. Blank who owned a cheque for £50 and lost it. The finder dishonestly gave it in payment for goods to a shopkeeper *five days* after its date. The tradesman cashed it at the bank, but the owner of the cheque brought an action against him for the £50, and won, because the judge held five days to be an unreasonable time for the cheque to have been in circulation. In a later case, in 1881, a similar thing happened, except that the

time was *eight days*, and here the judge held that, in the circumstances, eight days was not unreasonable. One may say that from one to three days will be safe, from three to eight doubtful, and beyond that very doubtful. In a still later case, two months was held to be clearly "an unreasonable length of time"; and, for my part, I should, for safe and practical purposes, draw the line at a week if I knew the man who brought the cheque, and three days if I did not know him pretty well. (*See further*, p. 493.)

(2) What is the effect of fraud or illegality upon a bill, note, or cheque? Fraud, as defined by Mr. Justice Byles, is "An artifice to deceive and injure"; and its effect is thus stated by a great judicial authority: "Fraud cuts down everything. The Law sets itself against fraud to the extent of breaking through almost every rule, sacrificing every maxim, getting rid of every ground of opposition. The Law so abhors fraud that it will not allow technical difficulties of any kind to interfere to prevent the success of justice and truth." I would have you note, in considering the effect of fraud in relation to bills, notes, and cheques, the difference between the positions of the original parties and of other holders. I can perhaps explain the matter best by illustration. Lax, by fraudulent misrepresentations, induces Max to draw a bill in his (Lax's) favour for £10 on Nax. Nax "accepts" the bill. Max can repudiate the whole transaction, and Lax cannot get the money. But if Lax negotiates the bill to Sax before it is overdue, and for value, Sax can claim the £10 from either Nax or Max, provided that Sax had no knowledge that the bill was obtained by fraud. For, if Sax takes the bill in good faith before it is overdue, and gives valuable consideration for it, he is a holder in due course; and it is no defence against a holder in due course to say that the bill was originally obtained by fraud. But suppose that Sax gave nothing for the bill, he cannot enforce it. Neither can he enforce it if he took it when it was overdue. Least of all can he enforce it if he knew, or ought to have known, that it was obtained by fraud. "Ought to have known" is a rather vague phrase. It means this: if Sax, when he discounted the bill, had his attention drawn to any circumstance which ought to have made him, as a reasonable man, suspect that there was something wrong, then he ought to have known.

Mr. Cosgrave bought a horse from Mr. Lewis, and gave him a cheque for the price. Lewis warranted the horse to be sound, but the very day of the sale Cosgrave discovered it to be unsound. He promptly stopped the cheque—that is, he wrote to his bankers and told them not to pay it. Then he offered to give the horse back to Lewis, and receive his cheque again. Lewis refused, and brought an action on the cheque; but it was held that he could not recover, because the instrument had been obtained by a misrepresentation. If Lewis had negotiated the cheque the same day he received it to (say) Smith, Smith could successfully have maintained an action on the cheque, provided he had no knowledge of Lewis's fraud.

Mr. Archer advertised a business for sale, and when Mr. Bamford answered the advertisement, Archer assured him that the takings for the past three months had been at the rate of £50 a week. Bamford believed him, and agreed to pay £200 for the goodwill of the business; but as he had not the ready cash, he gave Archer a bill at six months. The representations as to takings turned out to be false and



fraudulent, and Bamford refused to meet the bill. Luckily for him, it had not been negotiated, and when Archer brought action on the bill for £200, Bamford, on proving how he was induced to give the instrument, was declared not liable. It was fortunate for the defendant that the bill had not been negotiated to a holder in due course, for had it been, Archer's fraud would have been no excuse for non-payment.

Take this case also: A fraudulently induced B to sign his name to a blank stamped paper. A then filled in the blank as follows: "I promise to pay A or order £100." Then A took the note to C and obtained £100 for it. It was held that C could recover the amount of the note from B, who, in my opinion, deserved very little sympathy in his misfortune. For an act of more egregious folly than that of signing one's name to a blank piece of paper, especially when the paper bears a stamp, I do not know. All the same, the instance just given is not by any manner of means an isolated case.

So much for bills, notes, and cheques obtained by fraud. Now let us speak of those given for an illegal consideration. What considerations are illegal have been pretty fully set out in the previous chapter of this Book (*see pp. 290 et seq.*). They may be roughly grouped under the heads of Immoral, Irreligious, Contrary to Public Policy, and contrary to some Act of Parliament.

Bills and other negotiable instruments given for an illegal consideration are on the same footing as those obtained by fraud; that is to say, they cannot be enforced by the person to whom they were originally given, because he is a party to the illegality. But if a bill, note, or cheque be given to Smith for an illegal consideration, and Smith indorses it to Jones, who is innocent of the illegality, takes the instrument before it is overdue, and gives a valuable consideration for it, Jones can enforce the bill, etc., though Smith could not. This is because Jones is a holder in due course. Illustrations are not far to seek. An Act of Parliament of the year 1835 says that all bills, notes, and other securities given in payment of gaming or wagering debts, which includes money lost at any game of chance or skill, shall be deemed to be given for an illegal consideration. Pidjin plays at nap with Pluck for one-pound points, and in the course of two or three hours manages to lose £100, for which he gives Pluck a promissory note payable on demand. Pluck is utterly unable to recover on the note, because it is given to him for an illegal consideration. It is, however, highly unlikely that the wily Pluck will attempt to bring an action on that note. If he has any suspicion that Pidjin intends to repudiate it, he will indorse it over to his friend Pike, who will give him something for it; and unless Pike knew that the note was given for a gaming debt, he, being a holder in due course, can recover the £100 from Pidjin.

It practically comes to this:—A holder in due course can always recover the amount of a bill, etc., no matter by what fraud it was obtained, nor how illegal was the consideration, except in the case of forgery (p. 487) and alteration (p. 485), and excepting also in certain cases relating to infants.

**A person under age** can never be liable on a bill of exchange, or any other negotiable instrument. This was decided in the case of Prince Soltykoff. An infant, as I have shown on page 357, is liable to pay for necessities according to his station in life; but if an infant purchases necessities and gives a bill, note, or

cheque in payment, he cannot be made liable upon that bill, note, or cheque. It used to be one of the favourite dodges of the money-lending fraternity, before the date of the Statute I am about to mention, to proceed against youngsters with expectations in this wise. Before the Infants' Relief Act, 1874, a debt for money lent to an infant was only voidable, not void. That is, the infant could, if he pleased, make the debt absolutely binding by renewing the contract when he came of age. This dodge was stopped by the Infants' Relief Act (*see* p. 355). But a new one was soon invented. It was to induce the infant to give a bill or note for the amount as soon as he became twenty-one. Such a bill could not be enforced against the young man by the money-lender himself, but if it got into the hands of a holder for value, he could render the ex-infant liable in a court of law. By the exertions of Lord Herschell, at that time Lord High Chancellor, an Act was passed by Parliament to put a stop to this practice also. This Statute, the Betting and Loans to Infants Act, 1892, is the only one, so far as I know, that interferes with the rights of a holder in due course. It enacts that where a person sued on a bill or note can prove that he gave it in discharge of a loan made to him during infancy, he cannot possibly be made liable to anyone whatever. The bill or note is not altogether bad, for anyone else whose name is on the instrument must pay if he is called upon to do so. The point is that a foolish or extravagant youth is not to be made to pay indirectly a loan that ought never to have been made, and that he could not be compelled to pay directly.

(3) **Dishonour and notice of dishonour.**—I would call the attention of the business man to this section especially, as the substance of it is most important, and is not so generally known as it ought to be. When a bill is given to you, drawn on (say) Smith, and it has not been already "accepted" by him, it is always advisable for you to present it to Smith for his acceptance without delay. It is advisable for your sake, because if the bill be accepted by Smith, you have the additional security of his name; and it is advisable for the sake of the drawer, because if Smith owes him money, and refuses to accept the bill when presented to him, the drawer can at once withdraw his money from Smith.

You will have noted, I doubt not, that I have used the word "advisable" in this connection, and not the word "necessary." For it is only necessary to present a bill for acceptance when it is made payable so long after sight.

[ Stamp. ]

£100.

London, January 1, 1896.

Three days after sight pay Mr. James Jackson or his order One Hundred Pounds for value received.

THOMAS THOMPSON.

To Mr. Samuel Smith, Merchant,  
at Manchester.

"After sight" means, for all intents and purposes, after acceptance by Samuel Smith, upon whom the bill is drawn. Therefore, before you can have any remedy upon the bill, you must present it to Samuel Smith and ask him for his acceptance. If he complies with the order, he will write his name across the bill in the manner shown on page 457. You should also request him to add the date, or you should add the date—in his presence, if possible. For from that date the three days begin.



In the case of bills not at sight, you need never present them for acceptance unless you have agreed with the drawer to do so. For instance, if the above bill were three months after date instead of three days after sight, Jackson, the payee, need not take the bill to Smith until the date of payment arrives, unless he has agreed with Thompson that he will do so. As I say, he will be well advised to take it or send it at once, but there is no legal obligation upon him to do so.

A **bill drawn after sight** must not only be presented for acceptance before it can become due, but it must be so presented within a reasonable time after you get it into your hands. Take the specimen bill printed on the last page, for example. Jackson, to whom it is given in the first place, must either present it to Smith within a reasonable time, or else negotiate it to someone else within a reasonable time. Suppose he negotiates it to Jones. Jones must either present it for acceptance within a reasonable time, or else negotiate it within that time. So also with any person to whom Jones negotiates it. Suppose, again, Jones negotiates it to Macpherson, and Macpherson keeps it an unreasonable time, and then takes it to Smith for acceptance. Smith refuses to accept it. Macpherson, by his unreasonable delay, has lost any right to get the money from Thompson, the drawer, or Jackson and Jones, who have indorsed the instrument in order to negotiate it. But Smith may accept the bill. If so, of course he is liable to pay Macpherson three days afterwards. Accepting a bill, however, is not paying it; for Smith may go bankrupt before the three days are up. Then, if Macpherson tries to extract the money from Thompson, Jackson, or Jones, he will be unsuccessful, because of his unreasonable delay in presenting the bill. In fact, the only way to keep a sight bill alive is either to get it accepted, or else to get rid of it by negotiation within a reasonable time after receiving it. Suppose Macpherson, after keeping the bill a long time, negotiates it to Green, who did not know of Macpherson's delay. Green takes the bill to Smith for acceptance the same day, but Smith refuses to have anything to do with it. Here we see that Green has been diligent, but the delay on the part of the dilatory Macpherson has absolutely destroyed all rights against the drawer and the previous indorsers, so that Green's only remedy is to extract the money from Macpherson himself.

As in the case of bills payable on demand, we come across the expression "reasonable time." What is a reasonable time depends on three things—the nature of the bill, the usage of trade with regard to bills of that character, and the facts of the particular case. The following is an instance where immediate presentment of a "sight bill," was excused on account of the nature of the bill: Messrs. Elford & Co., bankers, of Plymouth, whose London correspondents were Messrs. Bennett & Co., drew a bill payable a week after sight on Messrs. Bennett & Co. This bill was given by the bankers in the country to Mr. Coulig, of Liskeard, who indorsed it to Mr. Robins, a tradesman, who indorsed it to a traveller of Messrs. Shute & Co. The traveller kept it for a week, and then sent it on to his employers, who, on the third day after receiving it, sent it to Messrs. Bennett & Co., the drawees, for acceptance. But in the interval the country bankers had gone bankrupt, and the London firm refused to accept the bill. Then Messrs. Shute & Co. sued Mr. Robins, who had indorsed

it, and he pleaded that by the delay of ten days in presentment Messrs. Shute & Co. had lost their remedies against him. In other words, he said that ten days was an unreasonable delay. Fairly enough, he argued that had the bill been transmitted at once by the traveller, and presented at once by Messrs. Shute, he (Robins) would not have been called upon to pay, because Messrs. Bennett & Co. would have accepted the bill—the failure of the country firm not being known. Lord Tenterden, a great commercial lawyer, tried the case, and he drew a distinction between such a bill as this and an ordinary sight bill given by one merchant to another. “Whatever strictness,” he said, “may be required with respect to common bills of exchange payable after sight, it does not seem unreasonable to treat bills of this nature, drawn by bankers on their correspondents, as not requiring immediate presentment, but as being retainable by the holders for the purpose of using them, within a moderate time (for indefinite delay, of course, cannot be allowed), as part of the circulating medium of the country.” From these remarks you may gather what would be considered an unreasonable time in respect of a common bill not drawn by one bank on another, when a delay of only a few days was held to be just within the line in the case of a banker's bill.

There was a case earlier than the one last mentioned, when Mr. Hill, of Windsor, having to pay Messrs. Fry & Co., of London, £134 18s. for goods, gave to their traveller a bill payable one month after sight, drawn by a country banker on his London correspondent. This was in 1817, before postal arrangements were so thorough and so well organised as they now are. The bill was handed to Fry & Co.'s traveller on Friday, and he did not transmit it to his employers until Tuesday. They received it the same day, and at once presented it at the London bank for acceptance. But, as in the previously cited case, the country banker, the drawer of the bill, had stopped payment that very day; and so the London bankers would not touch the paper. When Fry & Co. came upon Mr. Hill, he replied that they had been unreasonably dilatory—that is, their traveller had—in not transmitting the note to London before Tuesday. But the jury held otherwise, *in the circumstances of the case*. According to Hill, the traveller ought to have sent the bill either on Friday, Saturday, Sunday, or Monday. As to Friday, the answer was that no man is bound to transmit a bill for acceptance on the same day he receives it. As to Saturday, it happened that there was no post from Windsor on that day. As to Sunday, the traveller very fairly said that he was not expected, surely, to trouble his head about business on the Lord's Day, when, according to the law, he was supposed to be at church. So the fight raged round Monday, and the jury was asked to decide whether there was unreasonable delay on the part of the traveller in not forwarding the instrument on Monday. The jury said the delay was not unreasonable. Now, however, a delay of four days would be held unreasonable, I imagine, because a post runs out of Windsor to London every day, including Saturdays.

With regard to foreign bills—payable after sight—the rule is not so strict. This is partly because of the greater difficulty of foreign communication, and partly because it is not at all uncommon for foreign bills “after sight” to be put on



the market by way of speculating on the rate of exchange; and this course of business is so general that everyone who touches a foreign bill is supposed to know it. For instance, if I draw a sight bill on India, when the rupee is worth only 13d., and it is presented for acceptance and afterwards for payment in India when the rupee is worth 15d., I lose 2d. on every rupee; because I cashed the bill for so many rupees worth only 13d., when by waiting a little while I might have got so many rupees worth 15d. Suppose this bill were for 1,000 rupees, and I cash it when the rupee is worth 13d. on the exchange, I receive  $1,000 \times 13 = 13,000d. = \text{£}54 \text{ 3s. 4d.}$ ; but if the man who bought it from me sells when the rupee is worth 15d., he will get  $1,000 \times 15 = 15,000d. = \text{£}62 \text{ 10s.}$ —a clear gain to him of  $\text{£}8 \text{ 6s. 8d.}$  Seeing that the rate of exchange fluctuates so considerably from day to day, it might be very imprudent to present a foreign bill at sight for prompt acceptance. Therefore a much longer time will be allowed. There is a case on record of a man who was held to have been within the limits of "reasonable length of time," though he had kept a bill for five months before he sold it again. This instrument was drawn on someone at Rio Janeiro, payable sixty days after sight; and it may be said that at the time the Brazilian exchange with London was not merely rising and falling—it was jumping up and down. But even a foreign bill payable at or after sight, and given by one merchant to another in the ordinary course of trade, ought to be presented or negotiated more quickly than a bill floated merely for speculative purposes. Why? Simply because the drawer and indorsers of such a bill know perfectly well that it is almost bound to float about the market for an indefinite time; and they cannot be said to be exposed to unforeseen risk by the fact of delay in presentment.

Seeing that presentment of a bill for acceptance is generally advisable and occasionally necessary, the question will be asked, **When, Where, and How** ought a bill to be presented? The answer is fairly simple. As to when—the bill must be presented at a reasonable hour, on a business day, before the bill is overdue [bills after sight, within a reasonable time after receipt]. As to when a bill is overdue, see p. 460. A business day is any day except Sunday, Christmas Day, Good Friday, the Bank Holidays ordained by Sir John Lubbock's Act, and any day set apart by royal proclamation as a fast or thanksgiving day—as, for instance, the day of the Queen's Jubilee in 1887. Bank Holidays in England are: Easter Monday, Whit Monday, the first Monday in August, and 26th of December, if a week-day; if not, the 27th of December. In Scotland they are New Year's Day, Christmas Day (if a week-day; if not, the day after), Good Friday, the first Monday in May, and the first Monday in August.

What is a reasonable hour? That depends a good deal on the kind of business in which the drawee of the bill is engaged. If I get a bill from Rothschild of Paris, drawn on Rothschild of London, payable three days after sight, and I take it to the London house for acceptance, I must go between ten and four, because these are the regular and well-known bankers' hours. But business hours are more extended than bankers' hours. I am not bound

to call at Brown & Co.'s, the printers, to get a bill accepted between ten and four, because the usual hours for the counting-house of a printer to be open are much longer. They have not in England gone the length of the Americans, who hold that "business hours," except for bankers, range through the whole day, until almost bedtime. In Great Britain the utmost length that has been gone was in the case of *Wilkins against Jadis*, in 1831. The notary's clerk who presented the bill had to present it at the house of one Townsend, 15, Godliman Street, Doctors' Commons (our old friend Sam Weller's "Doctor Sccommons"). He took it there at about eight o'clock in the evening, and found the house shut. Knocking and ringing were of no avail, and the clerk came away. But it was held to be a sufficient presentment at a reasonable hour. I hardly think it would be safe, nowadays, for anyone to present a bill at a City house at eight o'clock at night. It stood valid in 1831, because at that time merchants generally lived on the premises where their offices were.

As to the **place** where a bill is to be presented—if there is a place named on the bill, it is enough to take it there. But a place is very rarely mentioned as the place of acceptance; and your proper course is to go to the drawee's place of business and present it there. But you must be careful how you do it. It will not be enough if you go to Jones's office with a bill, and get his errand-boy to accept it on Jones's behalf. Mr. Roper drew a bill of exchange for £60 on J. Hammond, tanner, of Bristol, and sold it to Mr. Cheek. Mr. Cheek sent a clerk round with the bill to Hammond's tanyard; and, according to the clerk's evidence, he saw a man who might have been Hammond or Hammond's confidential clerk, but who did not say who he was, nor could the clerk swear whether it was Hammond or Hammond's clerk, or who it was. What happened was that the clerk handed the bill to this man whom he saw in the tanyard, and said, "I've brought this bill for your acceptance." The anonymous one merely said, "I'm not going to accept any bill"—and, in fact, expressed the view that it was "cheek" of the clerk of Cheek to bring such a message.

Now, if this man had been Hammond, or anyone left in charge by Hammond, this would have been a clear refusal to accept the bill; and Cheek could have asked Roper (the drawer) to pay it. But when the clerk was cross-examined by Garrow, a noted barrister of the day, he was unable to swear positively that the man to whom the bill was presented was Hammond or anybody connected with that worthy maker of leather. Whereupon the Court refused to order Roper to pay; holding that Cheek had not proved non-acceptance by the drawee. It would never do, Lord Ellenborough said, for a person who took a bill to be accepted to go to the drawer's premises and ask the first person he saw to accept the bill, without knowing who that person was. The clerk should have asked the man who he was; and if the man had represented himself to be Hammond, the clerk's evidence would have been worth something. For a bill, when presented for acceptance, must be presented either to the drawee himself, *in propria persona*, or to his authorised agent. This must be so, if you reflect a moment: it would never do to put a man's credit at the mercy of every clerk or workman in his place.



When a bill is addressed to two or more persons, the mode of presentment varies according as those persons are partners or not. For example, a bill in this form :—

*London, March 1, 1897.*

£100.

One month after date pay William Williams or order One Hundred Pounds for value received.

ANDREW ANDERSON,

To Messrs. Samuel Smith and Robert Robinson,  
at Manchester.

William Williams wishes to have the acceptances of Smith and Robinson as better security that the bill will be met at the end of the month. Must he have both their signatures, or will one be enough to bind them both? This depends on the answer to the question :—"Are they partners; if so, what business do they carry on?" If they are not partners, then Williams must ask each of them to sign; for Smith's signature will only bind himself; and the like with Robinson.

If they are partners, carrying on a mercantile business, in which bills are accustomed to be given, one partner can sign for both; and the firm is thereby bound—unless Williams knew that, by the partnership agreement, both must sign. But in a non-mercantile business one partner cannot make the firm liable for "paper" signed by him unless the rest of the firm have expressly told him that he may. You see, the rule governing mercantile firms is exactly the contrary of that governing non-mercantile firms. A firm of merchants, or bankers, or importers, or cotton-spinners, or tanners, and, in fact, any firm carrying on a business of buying and selling—whether they sell the thing bought, or whether they buy raw material and sell a manufactured article—usually gives bills in the ordinary course of business. And as each partner is supposed to be authorised to do anything in the ordinary course of business, he is supposed to be authorised [lawyers say, "he has implied authority"] to accept bills on behalf of the firm. But if you know as a fact that one partner has no such authority, as far as you are concerned the supposition or implication falls to the ground.

But a firm of lawyers, or architects, or estate agents, who do not carry on trade, and do not necessarily require credit for their business, is supposed not to have any need for bills of exchange. Therefore no partner can be supposed to have authority to sign the firm's name to such a document; for a partner, as such, has only implied authority to bind the firm in matters relating to the firm's business. Hence, if you have a bill drawn on a firm of solicitors, be sure to ask every partner to sign the acceptance; or if one offers to sign the firm's name, ask him to show you his authority.

When the drawee is dead, the holder of the bill may present it, if he pleases, to the personal representative of the deceased—that is, his executor or administrator (*see* Book V., Chapter 2)—or he need not present it at all for acceptance. When the drawee is bankrupt, the holder is again not obliged to present the bill for acceptance; but he can, if he pleases, present it either to the bankrupt or his trustee (*see* p. 371). When the drawee is dead or bankrupt and the

holder of the bill exercises his right of not presenting it for acceptance, he may treat the bill as though he had presented it and it had been dishonoured by non-acceptance. It very often happens that a bill is drawn on a fictitious person; and if you have such a document, you may treat it as dishonoured as soon as you find out that the drawee is merely a name and has no real existence. The same applies if the drawee is an infant, for infants have not the legal capacity to contract by bill (p. 354); and it also applies if the drawer is a lunatic, for a lunatic can do no legal act (p. 365). It is also a good excuse for non-presentment for acceptance if after doing your best to get the bill accepted you are unable to accomplish your object. For instance, you may call at the drawee's place of business in business hours once or twice and fail to find him in, and also be unable to discover any clerk or servant who has authority to accept bills on his behalf. In such a case you are entitled to act as though acceptance had been refused.

Similarly, if you go to a man out of business hours, and he refuses to accept the bill, but not because it is presented at an unreasonable hour, you are entitled to deem the bill dishonoured. Suppose you have a bill drawn by Jones on Smith, and you go to Smith's house at midnight, and request him to sign an acceptance. He is quite entitled to say, "I absolutely refuse to accept a bill at this hour." Then you will be obliged to ask for an acceptance at a more reasonable time of day. But if he says, "I decline to accept Jones's bill," that is a point-blank refusal, and if you at once bring an action against Jones for giving you a bill that was dishonoured, Jones will not be able to take the objection that presentment for acceptance was made at an unreasonable time. Why not? Because acceptance was not refused on the ground of the unreasonableness of the hour, but it was refused because Smith declined to touch the paper.

It is no excuse for non-presentment that the holder has reason to believe that the drawer will not accept the bill. Of course, this does not apply where the drawer is a fictitious person or cannot accept the bill. So long as the drawee is a real person, the holder must, in the case of a bill at or after sight, present it at the proper time, even though he may have met the drawee in the street, told him of the bill, and been informed that if presented it will not be accepted.

There is one point which all traders and merchants should know, referring to the **presentment for acceptance**. When you present a bill for acceptance you cannot demand that it shall be accepted then and there. Suppose, for example, you have a bill drawn on Coutts & Company, and payable three days after sight. As you are bound to do, you take this bill to the bank within a day or two after you receive it, and ask that it should be accepted. Messrs. Coutts & Company may desire you to leave it with them; and if they so request, you must deposit it with them until whatever hour (within business hours) of the next day they may choose to fix.

Some people say that the drawee of a bill is only entitled to twenty-four hours in which to accept or refuse. In these twenty-four hours non-business days are not included. Thus, if you take the bill to Messrs. Coutts & Company's establishment at eleven o'clock on Friday, you must call for it at eleven o'clock on



Saturday. If you leave it at eleven o'clock on Saturday, you call for it at eleven o'clock on Monday. If the bill is not accepted within the customary time, the holder is bound to treat it as dishonoured. I shall presently show what a holder must do when a bill is dishonoured by non-acceptance; suffice it here to say that if a bill left for acceptance is not accepted within the customary time, and the holder does not treat it as dishonoured, he must take those steps, or he will lose his rights against the drawer and indorsers whose names are on the bill. When you leave a bill for acceptance you must call or send for it; you cannot ask for it to be sent to you.

It occasionally happens that the drawee is only willing to give a **qualified acceptance**. Let me give one instance for the purpose of illustration. Suppose you have a bill drawn on Samuel Smith in this form:—

*London, April 1, 1897.*

£500

Seven days after sight pay James Jackson or his order Five Hundred Pounds for value received.

PETER PIPER.

To Samuel Smith,  
Liverpool.

Jackson negotiates the bill to you. The next day you walk into the office of Samuel Smith and present your bill, asking Samuel to be kind enough to place his esteemed autograph thereon, along with the word "accepted" and the date. Mr. Smith replies that he will be pleased to sign "Accepted to the extent of £100," but he is not willing to be liable for any greater amount. You can then please yourself whether you take this qualified acceptance. You are not bound to take it, because you have a right as against the drawer (Piper) and the indorser (Jackson) to expect that the drawee should accept the bill as it stands—that is, wholly and unconditionally. So that if an offer of conditional or partial acceptance is made to you, you may say, "No; I will not take such an acceptance. I will have all or nothing"; and if the drawee still declines to accept unconditionally, you may and must treat his refusal as a total refusal to accept the bill; and the bill is, therefore, dishonoured by non-acceptance.

When a bill is presented by the holder for acceptance, and acceptance is refused, the bill is said to be **dishonoured by non-acceptance**; and, as I have shown, when the bill is drawn on a fictitious person, an infant, a lunatic, a bankrupt, a dead man, or a man who dies or becomes bankrupt between the day you get the bill and the time you ought to present it to be accepted, you may treat the bill as if it had been dishonoured. It is obvious that a promissory note can never be dishonoured by non-acceptance, because there is no drawee, and there can be no acceptance; so that the law relating to presentment for acceptance, dishonour by non-acceptance, etc., only relates to bills. But the law relating to **presentment for payment and dishonour by non-payment** applies to notes as well as to bills. By way of preliminary, let me say that if you are the holder of a bill or note, you are entitled to your money from any person whose signature is on that bill or note. In the case of a bill, you ought to ask the

acceptor first, but if he does not meet the bill, you have a right against the drawer and all indorsers (*i.e.* people whose names are written on the back of the bill). In the case of a note, you ask the maker to pay, because it is, "*I promise to pay, etc. PETER PIPER.*" You ask Peter first, therefore, and if he fails, go for the indorsers. When you take a bill to the acceptor [drawee] and ask for payment, that is called "presentment for payment"; and the same when you take a note to the maker, or a cheque to the banker.

When, where, and how must presentment for payment be made? I have already stated, in discussing the meaning of the term "overdue," when it is that a bill or note falls due for payment. A bill payable on demand is, as I said, overdue when it has been in circulation for more than a reasonable time (p. 460). Such a bill must be presented for payment within a reasonable time (*see* pp. 460-1) after the date, or otherwise the drawer is discharged. If it is not presented for payment within a reasonable time after it is received by you, the person from whom you received it (indorser) is also discharged. But a drawee who has accepted a bill is not discharged from liability because a bill is not presented before it is overdue. For example, consider a bill in this form:—

£100	Accepted A. Anderson April 1. 1897	London, April 1 <sup>st</sup> 1897.  <i>On demand pay John Jackson or order One Hundred Pounds for value received</i>  Peter Piper  <i>To Mr. Andrew Anderson, 1001, Cheapside, E.C.</i>
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This bill is originally given to John Jackson on the date of issue. Next day he negotiates it by indorsement (because it is "or order") to Samuel Smith, who, on the 3rd, indorses it over to Frederick Fish, who, on the 4th, indorses it to George Gage, who, on the 5th, indorses it to Henry Hobbs, who keeps it over Sunday, until the 8th, and then presents it to Andrew Anderson for payment. Anderson is bound to pay, though seven days is an unreasonable time in the circumstances—the bill being drawn in London on a man in London. But what if Anderson cannot pay? Hobbs will look to the drawer and the indorsers. First he goes to Peter Piper, the drawer; but Peter says, "You presented it for payment an unreasonable time after I issued it. I decline to pay." And Mr. Piper will have an impregnable position. So Hobbs interviews Jackson, the first indorser, and is informed that the presentment was made so long after the 2nd (six days) as to be unreasonable. And Mr. Jackson also has the law with him. So have Samuel Smith and Frederick Fish; but probably George Gage has not, for the jury may hold that the presentment on the 8th (Sunday intervening) was a reasonable time after the 5th, when Gage indorsed



the bill over to Hobbs; and if the jury do take this view, Gage will have to pay.

Understand, please, a promissory note payable on demand is not subject to anything like so strict a rule. It may be, and often is, intended to stand as a more permanent security; and it is always a question of fact in each particular case whether the note has been held too long or no. If a note payable on demand is given as security for a loan, five or six years would not be unreasonable. But if given just as an acknowledgment of a trade debt, it is more in the nature of a bill, and five or six months might be unreasonable.

A bill or note payable on a fixed day must be presented in business hours the day it is due—being careful, of course, to remember the days of grace (p. 458). What happens if you do not? You have a note dated January 1st, 1897: "I promise to pay one month after date Arthur Adze or order one hundred pounds. BEN. BADZE." Adze has indorsed it to Cadze, who indorsed it to Dadze, who indorsed it to you on the 28th of January. On the 4th of February you ought to take your note along to Mr. Badze and ask for the £100. But you do not. You forget the matter entirely, and do not remember it until next day, the 5th. As far as Badze is concerned, it makes no difference. He is bound to pay after the bill is overdue just as much as when it is due; and if he has the money ready to pay with, or is worth bringing an action against, you need not trouble much. But should Badze be a man of straw, not worth the trouble and expense of suing, you will have cause to repent your bad memory; for you have, by your delay, thrown away your right to sue Adze, Cadze, and Dadze, the indorsers of the note, who would have been liable had you presented the note and been refused payment of it on the day it fell due and payable. This is another illustration of the proposition I laid down a few pages ago, namely, that in bill and note transactions the utmost diligence is required.

Although diligence in making presentment for payment is prescribed by law, yet delay is occasionally excused. The Bills of Exchange Act, which did not alter, but only crystallised the law on this point, says: "Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of the delay ceases to operate, presentment must be made with reasonable diligence." This, I believe, is the law all over Europe, and in all civilised States in other parts of the world. It is almost as old as bills of exchange themselves. Illustrations crowd upon one:—

A bill drawn upon a resident in Paris fell due on the King's birthday (it was in the year 1840), on which day, by the law of France, there was a general holiday. The holder of the bill was held excused for not presenting it on that day.

Mr. Moses Patience, a lender of money, was the holder of a bill drawn in England, and payable at Leghorn on the 10th of September, 1800. The gentle Patience did not, however, present it until the 31st of October. When asked, "Why this delay?" he proved that during September and the early part of October, Leghorn was in the hands of a foreign foe—a state of things, of course, quite suspensory of all business. A Mr. Townley, whom it was sought to render

liable on the bill, pleaded that he was excused by the delay in presentment for payment; but the Lord Chief Justice thought Mr. Moses Patience could hardly be expected to go round collecting debts in a town occupied by hostile soldiery. Wherefore the delay was excused, and Mr. Townley was compelled to pay and bear it.

If I send my clerk from London to Glasgow on the morning of the day before a bill is due, in plenty of time to make due presentment in the ordinary course of things, and the train is wrecked and my clerk injured, the delay caused by this untoward accident is excused, because it is caused by something not under my control, and not by my default, misconduct, or negligence.

Presentment for payment, like presentment for acceptance, should be made by the holder, or by someone authorised by the holder to receive the money, at a reasonable business hour on a business day, to the drawee (or maker of a note) or his agent. When you present the bill or note for payment, it is not enough merely to tell the person to whom you present it that you have such-and-such a bill or note of which you require payment. You must produce the document and give it into his hands, and if he pays the amount, you must allow him to keep the instrument. It is quite legal for you to make presentment through the Post Office, either for payment or acceptance; and in that case you will do well to use a registered letter. As to the **place of presentment for payment**, the law is a little strange. If you ever get hold of an accepted bill, you will usually find written across it, "Accepted payable at the X Y Z Bank." Many people think that such an acceptance precludes them from presenting the bill anywhere else than at this bank. This is a mistake. You may present it for payment either at the X Y Z Bank, or to the acceptor personally, wherever he may be. The only way in which to make a bill (or note) payable at a bank and nowhere else, is by saying so. For instance, if John Johnson wants to be sure that a bill accepted by him shall be presented for payment at a particular bank [say Loyds' Bank, Head Office], he must write, "Accepted payable only at Loyds' Bank, Head Office." But this is a conditional acceptance, which the holder of the bill is not bound to take (*see* p. 472). In the same way a bill is often accepted payable at a particular address other than a bank, and the rule is similar to the above—you may present the bill either at the address named, or to the payer personally, at your option. But if you ever wish to make the drawer or an indorser liable, you must be able to prove presentment at the place named. Such presentment is, therefore, always advisable.

When no place is named for payment, the holder ought to find out the business address of the man from whom the money is to be demanded, and there make his claim. If he cannot find out that person's present business address, he may go to his private residence; or if he cannot find any address at all, he may take it to the drawee's last known address, and ask someone there if he has authority to pay. Such a course is equivalent to presentment for payment. Occasionally a bill is accepted payable in a particular town—*e.g.* "Accepted payable at Bristol"—and then the holder's duty is to go to all the banks in Bristol, unless he can find out the drawee's whereabouts and manage to see him personally. If he presents the bill to all the Bristol banks, he has



done everything required of him; and if none of these banks will pay him, he may treat the bill as dishonoured.

Whenever the drawee of a bill or maker of a note is bankrupt, or dead, or cannot after due search be found, or is a minor or a lunatic, the holder of the document has the right to consider the bill dishonoured by non-payment, and may refer to the drawer or one of the indorsers.

**What the holder of a bill or note must do when the instrument is dishonoured** is a very important matter calling for the consideration of the business man. As I have explained, a bill is said to be dishonoured when it is properly presented to the drawee (the person on whom the bill is drawn) for acceptance, and he refuses to accept it; and a bill or note is said to be dishonoured when it is properly presented for payment to the acceptor or drawee (of a bill) or the maker (of a note) and he refuses to pay it. Thus, you have a bill dated the 3rd of January, addressed to Thomas Jones, ordering him to pay John Jackson, three months after date, the sum of £100, and signed "William Smith." Before the 6th of April (three months *plus* three days of grace) you take the bill to Thomas Jones and ask him to accept it. He refuses to do so. The bill is "dishonoured by non-acceptance." A note cannot be dishonoured by non-acceptance, because it is not drawn on anyone. Or, again, on the 6th of April you or your agent (probably your banker) take the bill to Thomas Jones and ask him to pay the £100. He refuses to pay. The bill is said to be "dishonoured by non-payment." If it were a note, "I promise to pay John Jackson, three months after date, etc., THOMAS JONES," and on the proper day you take it to Jones and demand payment, and he refuses to pay, the note is also "dishonoured by non-payment."

Having thus explained the terms "dishonoured by non-payment" and "dishonoured by non-acceptance," let us see what ought to be done when either of these things happens. Let me repeat that you, the Business Man to whom I address myself, ought to be as thoroughly conversant with the law on this subject as with the multiplication table. You must give **Notice of Dishonour**. The old business man will have a pretty good notion of what notice of dishonour is, but the neophyte will wish the term to be explained. He will ask, to whom, when, and how must I give this notice? The answer, though somewhat long, will not, I think, be difficult to follow or remember.

"Notice of dishonour," says the Statute, "may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonoured by non-acceptance or non-payment." Moreover, "the return of a dishonoured bill to the drawer or an indorser is a sufficient notice of dishonour." And "an insufficient written notice may be supplemented and validated by verbal communication."

This, in point of practice, means that if you are the holder of a bill drawn by Grones on Bones, and you present it on the day when it falls due to Bones, and Bones refuses to pay, and you wish (for reasons that will appear hereafter) to give notice of dishonour to Grones, you must tell Grones plainly that such-and-such a bill, drawn by him on Bones, has been dishonoured by non-payment. You may write this in any way you like, so long as you put the facts into

language that Grones can understand ; or you may meet him in the street or at the club, and tell him verbally. It will be enough if you tell him verbally, "I hold a dishonoured bill of yours," and afterwards write and give him particulars—*e.g.* "Dear Grones, the bill I mentioned to you to-day is one dated April 1, 1896, and drawn by you on Bones in favour of Kronos.—Yours truly, X. Pones." Nay, so much does the law prefer substance to form in this matter, that you may write the above words on a postal-card without signature, and it, together with the verbal communication, will be a good notice of dishonour. Again, you must, when you give notice, describe the bill or note sufficiently to identify it ; but your notice will not be bad by reason of the fact that you make a mistake in the description, unless the person to whom you give notice is actually misled. For if he is not misled, he suffers no harm by the mistake. Take, for example, this case : A bill in these terms comes into your hands :—

*January 1, 1897.*

£20      Two months after date pay Septimus Severn or order Twenty Pounds  
for value received.

OCTAVIUS OGG.

To James Jason,  
Glasgow.

Severn indorses this bill to you, and on March 4th you present it to James Jason for payment. He refuses to pay. As he had not accepted the bill, you try to get payment from the drawer (Ogg) or the indorser (Severn). You send notice of dishonour to Ogg as follows : "A bill of yours, dated January 1st, 1897, for £200, drawn by you on Jason of Glasgow, is in my hands, dishonoured by non-payment." By mistake you have written £200 instead of £20. If Ogg really had given to somebody a bill for £200 drawn on Jason of Glasgow, your notice will mislead him, because he will think it is the £200 bill that has been dishonoured. But if the £20 was the only one of that date drawn on the Glasgow man, Ogg will not or ought not to be deceived ; your notice will be a good one. At the same time, it is well, in giving notice of dishonour, to describe the bill as accurately and fully as possible. I should recommend a form of this kind :—

*Birmingham, March 5, 1897.*

To Octavius Ogg,  
5006, Great Bigg Street, London, E.C.

SIR,—I beg to give you notice that a bill for twenty pounds, drawn by you upon James Jason of Glasgow in favour of Septimus Severn, payable two months after date, has been dishonoured by non-payment [or non-acceptance, as the case may be].

TIMOTHY TOUCHWOOD.

It is quite proper, and, indeed, the best course to pursue, to send notice of dishonour by post. For, should the letter not be delivered through the fault of the Post Office, you will not be blamed, and it will be counted to you just as though the letter had been duly delivered. Suppose, however, that letter is not delivered because it is improperly addressed, it becomes a question of fact as to whether you or your clerk used due care in writing the address. If you did, you are excused the mistake. If not, your notice is



bad. It may well be that you never had occasion to correspond with Mr. Ogg before, and therefore did not know his address. After vainly consulting the Directory, you went to someone in the same line of business as that gentleman, and asked him if he could tell you where to write, and he furnished you with the address—5006, Great Bigg Street, E.C. As a matter of fact, that was the place where Ogg carried on business many years ago; but he had removed from London altogether, to Bedford, and the letter is returned to you with “Gone. Address unknown” marked upon the envelope. In such a case the misdirection was no fault of yours, and if you afterwards find out Mr Ogg’s true address, you can give him notice and at once bring an action against him on the bill.

The time of giving notice is a very important matter. As a rule, when Octavius Ogg draws a bill on James Jason he expects Jason to accept and pay the bill, because Jason has money or money’s worth belonging to him [Ogg] in his hands. For instance, if Ogg sells goods to Jason at three months’ credit, it is very often arranged that Jason shall accept three months’ bills for the amount, drawn on him by Ogg. The advantage of this to Ogg is that while if he gave three months’ credit without bills he would have to wait three months before he could get a penny for his goods, if he gets bills he can, if he wants money, “discount”—that is, sell those bills at any time for cash; so that Jason gets time, and Ogg gets the price of his goods, less a small discount, at once. Now, if Ogg should draw a bill for £1,000 on Jason, and discount it to Severn, and when Severn takes it to Jason, the latter refuses to accept it, or to pay it, the matter becomes very serious for Ogg; and it is important that he should know at once, so as to be able to take steps against the man who has broken faith with him. For he has let Jason have £1,000 worth of goods on credit, and he will be liable, as the drawer of the bill, to pay £1,000 to Severn, the holder.

In this matter the holder must be very prompt. The least unnecessary delay will cause him to lose his rights against the people from whom he could have recovered the money had he taken time by the forelock. Let me assume the same case as the one given above,—a bill drawn by Ogg on Jason in favour of Severn: Severn indorses it to you, you duly present it on the 4th of March, and Jason refuses to pay. The persons to whom you should give notice are Ogg and Severn. If you live in the same place as either of these gentlemen, the notice must be given or sent off in time to reach him the day after the dishonour of the bill. If either of them does not live in the same place, the notice must be sent off by post the day after the dishonour. There is one exceptional case, which is where the bill is in the hands of an agent to collect. Suppose you live at Birmingham, Jason resides at Glasgow, Ogg carries on business in London, and Severn at Birmingham. You very likely have a correspondent at Glasgow; and to him you send the bill for collection. He duly presents it on the 4th of March, and it is dishonoured. He can, if he likes, send notice in your name to Ogg and Severn direct; and in that case he must post the letters in time for the London and Birmingham mails respectively not later than the evening of the 5th.

In the alternative, your agent may write to you, and leave it to you to give the necessary notices. His letter to you must be posted not later than the 5th, in time to catch the mail to Birmingham that day, and will reach you on the 6th. You must give notice to Ogg not later than by the post leaving Birmingham for London on the 7th; and must give to Severn a warning that reaches him some time on the 7th. The reason for this difference lies in the fact that Mr. Severn lives in the same place as yourself, while Mr. Ogg does not. Most people who have bills to collect pay them into their banks, and the banker undertakes to present them for payment. Remember that if your banker gives you notice that a bill has been dishonoured, you must give notice to the drawer and indorsers within the time above mentioned.

**The consequences of not giving notice** are that any drawer or indorser to whom notice is not given is discharged from all liability, except in the few cases following, in which such notice is dispensed with:—

(1) When after the exercise of reasonable diligence notice cannot be given or does not reach the person to whom it ought to be sent.

(2) By what is called "waiver." This is a word which expresses the giving up of a right, or condoning a fault. For instance, if you are a week late in giving notice to the drawer, but he, nevertheless, promises to meet the dishonoured bill, he has "waived" or condoned the irregularity.

(3) You are not obliged to give notice of dishonour to the drawer when he figures in the double capacity of drawer and drawee; nor where the bill is drawn on a fictitious person, as where Sarah Gamp draws a bill payable to Betsy Prig, the drawee being Mrs. Harris. The unsuspecting Betsy, on the last of the days of grace, goes to the address given, in order to present the bill for payment, and finds, to her disgust, that "there ain't no Mrs. 'Arris." Mrs. Prig can commence an action against her "friend and pardner" without giving notice of dishonour. Neither is any notice to the drawer necessary where the drawer is a person without power to contract—such as an infant or a lunatic; nor where the drawer or acceptor is a person who is under no obligation to the drawer to pay or accept. On the previous page I gave an instance of a buyer of goods at three months' credit who had agreed to accept bills for the amount, payable in three months, and who was therefore under an obligation to accept such bills drawn on him by the seller. But if my friend Hardpace chooses to draw a bill on me, who do not owe him a penny, and give it to Baggs & Co., I am in no way bound either to accept or pay that bill. And if it is presented to me, and I decline to have anything to do with it, the holder of the instrument can bring an action against Hardpace without notice. The reason of this is that Hardpace is entitled to no consideration, since he chose to put my name in the bill without asking my leave, on the mere chance that I would honour his draft.

Although you may be justified, in the cases mentioned in the last paragraph, in not giving any notice of dishonour to the drawer, it does not follow that you are able to dispense with that notice so far as the indorsers are concerned. You are only justified in bringing an action against an indorser without having given notice of dishonour, where the drawer is a fictitious person or a person



having no capacity to contract, and the indorser was aware of the fact when he put his name on the back of the bill. Secondly, when the bill (or note) was drawn for the accommodation of the indorser—*i.e.* when the indorser has got a couple of friends to put their names to a piece of paper in order that he may sell it—he is not entitled to notice of dishonour; and, thirdly, he is not entitled to such notice when the bill was presented to him for payment.

**A word of advice**—if you become the holder of a bill, and on presenting it for payment or acceptance it is dishonoured, sit down quickly and write out a notice such as I have given on page 477, and send it at once to the drawer and to every person whose name is on the back of the bill. It may happen that you would be held justified in not giving such a notice; but take no risks. And take care to post the notice at once, and keep a copy. So shall you be sure of winning if you ever have to bring an action against the drawer or indorsers.

**Whom to sue when a bill is dishonoured.** This is a most important point; for the great thing, after all, is to know to whom you have a right to look for your money.

(a) *When the bill is dishonoured by non-acceptance*, the holder, in England, never has any remedy against the drawee who has refused to accept the instrument; but in Scotland he sometimes has. Thus, Rake owes £100 to Jake, and the latter draws a bill in this form:—

London, April 1, 1897.

£100.

Three days after sight, pay to Phineas Phake or his order One Hundred Pounds sterling for value received.

JONATHAN JAKE.

To Mr. Robert Rake, merchant,  
at Manchester.

Phake indorses this bill to Solomon Sake, and the latter duly presents it for acceptance at Rake's counting-house. But Rake refuses to accept it. Now, this being an English bill, all that Sake can do is to give notice of the dishonour to Jake and Phake, and, if neither of them pays, sue one or both for the £100. Had it been a Scottish bill—that is to say, had Jake lived in Edinburgh and Rake in Dundee—Sake would have been able to recover the money from Rake. Why? Because in Scotland, when A owes money to B, and B draws a bill on A (*i.e.* orders him to pay the money or part of it to C), the money becomes C's. Therefore, A has no right to refuse to pay C, because the money is now due to him, and not to B. So that north of the Border the holder of a bill has one remedy and one right more than he has in England. In both countries, when a bill is dishonoured by not being accepted when presented for that purpose, he who holds the instrument can, after giving notice (*see pp.* 476-8), demand and sue for the money from (1) the drawer, (2) all the indorsers (*i.e.* the persons whose signatures appear on the back of the instrument).

You will have gathered from the last paragraph that the holder of a bill in England has the right to demand the money represented by that bill from the drawer and all indorsers as soon as the bill is dishonoured by non-acceptance.

But if such a holder fails to give notice, provided that notice ought to be given to any one or more of the drawers and indorsers, he loses his right against all whom he did not notify. The holder of a Scottish bill dishonoured by non-acceptance has the same rights and remedies as his English fellow; and, in addition, he may sue the drawee who refused to accept, if the drawee owed money to the drawer, and ought to have accepted the bill.

(b) *When the bill or note is dishonoured by non-payment*, you have the right to "go for" the acceptor [supposing the bill to have been accepted], the drawer, and all or any of the indorsers, after giving the proper notices. Should the bill not have been "accepted," you make your demand on the drawer and the indorsers, in England; but in Scotland you may add the drawee to the list if he had money of the drawer in his hands at the time—the same as in the case of dishonour by non-acceptance.

**Indorsing a Bill or Note.—Different Kinds of Indorsements.**—I have explained that if I have a bill or note, and wish to transfer it to you, I can do so sometimes by mere delivery—like cash; and sometimes I must sign my name on the back of the bill or note and hand it to you. My signature is called my "indorsement," and I am called "an indorser." In the case of a bill or note payable to "Smith or bearer," the instrument is transferred by mere delivery; but in the case of one payable to "Smith or order," Smith must indorse the bit of paper in order to make it your property. He may indorse it simply by signing his name, without more; and this is called an *indorsement in blank*. It is so called because, though Smith, by indorsing the paper and handing it to you, makes it yours, he does not specify to whom he transfers it. Suppose, on the other hand, Smith writes on the back, "Pay W. Brown.—J. SMITH," this is called a *special indorsement*, because it specifies the new owner.

Now, a "special" indorsement has some advantages and some disadvantages as compared with a "blank" indorsement; and as the virtues of these are much less widely known than they ought to be, I will explain them fully. A great many people do not know that if Smith has a bill or note payable to "Smith or order," and Smith indorses it in blank—i.e. merely signs it on the back—the bill or note at once becomes payable to bearer, and can be transferred from one person to another by mere delivery, without indorsement. Thus, in the instance given above, where Smith transfers a bill to you merely by signing his name and handing you the slip of paper, you, in turn, may transfer it to Robinson merely by handing it to him, without signing your name on the back. This is convenient for you in one way, because, should Robinson present the bill and it is dishonoured, he can claim against Smith and not against you, because Smith is an indorser and you are not. But the indorsement in blank has its inconvenient side. Suppose you lose the bill and it is found by someone who sells it to Robinson, the latter buying it in good faith, before it is overdue, you have not only lost the bill, but lost the money that it represents. Why? Because Robinson is the "holder in due course" (see p. 458).

Now take the case of the "special" indorsement. Smith, in transferring the bill to you, writes, "Pay W. Brown.—J. SMITH." As I have said (p. 454),



"Pay Brown" is equivalent, on a bill or note, to "Pay Brown or his order." Consequently, the bill cannot now be transferred except by Brown's indorsement; and when he sells it to Robinson he will have to sign his name on the back. In his turn, Brown may make the indorsement "in blank" or "special"—that is, may merely sign his name, or may, in addition, write, "Pay R. Robinson." In the latter case the bill is only negotiable by indorsement; in the former, it becomes payable to bearer. The especial beauty of a bill, etc., specially indorsed is this, that should Brown lose the paper, it will be of no value to the finder, because it can only be negotiated by Brown's indorsement. Its disadvantage is that whenever Brown wishes to transfer it he must indorse it, and therefore become liable to pay it if it should be dishonoured. There is, however, one way for Brown to avoid liability, which is to write, after his signature, the words "*Sans recours*"—a French phrase, which means that if the bill should be dishonoured the holder is to have no claim against Brown. Let me say that I, for one, should be very chary of taking a bill from an indorser who wished to add "*Sans recours*" to his signature, because I should feel that he had very little confidence in the bill being duly honoured.

It is the safest plan, when you are asked to discount (*i.e.* give cash for) a bill or note, to ask your customer to indorse the paper, even when his signature is not absolutely necessary, because by this precaution you secure another person to whom you can look for payment should necessity arise.

Sometimes an indorsement *sans recours* is a most proper one, and the only one that can be reasonably required; and that is when the indorser is merely an agent, who has no personal interest in the matter. Thus, Jonathan Brothers of New York receive English bills in payment of goods, and these bills they send over to Mr. John Bull of Liverpool, their agent, to turn into money. By way of precaution, the bills are indorsed, "Pay John Bull.—JONATHAN BROTHERS." Now, Mr. Bull is bound to put his name at the back of these bills in order to negotiate them for his correspondents; but he has no wish to render himself personally liable to meet them. And so, when he repairs to the discount, he represents himself merely as agent of Jonathan Brothers, and indorses the bills *sans recours*.

I would also say—and this, again, is not so generally known as it ought to be—that if you receive a bill indorsed "in blank" you may turn it into a "special" indorsement; and that is the right of any holder of a bill. Thus, a bill is drawn, "Pay Smith or order." Smith signs on the back, and hands the paper to Brown, who gives cash or other value for it. Brown negotiates it in turn to Robinson, by mere delivery, without indorsement. Robinson negotiates it to Jones, and writes on the back, above Brown's signature, "Pay Jones or order," or (which is the same thing), "Pay to the order of Jones"; but Robinson does not indorse the bill himself. The effect of it is that the instrument, which became a bearer bill (p. 449) by Smith's blank indorsement, becomes an order bill (p. 449) again by reason of the special words added by Robinson. The latter does not incur any liability by what he has done; for without signature no man becomes an indorser. It seems to me that this affords a very simple and easy preventive against the evil consequences of a bill becoming lost in the post, or stolen, or otherwise falling into the wrong

hands. If you are the Robinson in question, and are sending the bill by post to Jones as payment of an account, if you send the paper in its original state—that is, merely indorsed in blank by Smith—and it falls into dishonest hands, the dishonest person has every chance of disposing of the bill, and you may, and probably will, lose the worth of the instrument. But by merely adding, “Pay to the order of Evan Jones,” you very much minimise the chance of loss; because no one is likely to discount the bill without being satisfied that it bears Mr. Jones’s valuable signature. These words be for the wise and prudent.

What I have said as to bills payable to order becoming payable to bearer when they are indorsed in blank does not apply to foreign bills (*see* p. 490).

Besides blank and special indorsements, there are certain others that are called *restrictive*. The object of these is to restrict or cut down the further negotiation of the bill; and they are made in cases where, for any reason whatever, the negotiator of such an instrument wishes to prevent it from circulating further. Such an indorsement is sometimes used also when the bill is given to a bank or other person to collect. Let me give a few examples. “Pay Martin only.—J. SWALLOW,” is, first of all, a special indorsement, because it names the person to whom the name is indorsed. In the second place, it is restrictive, because of the word “only,” by which Martin is prevented from negotiating and also from transferring the bill to anyone else.

The words “Not negotiable” on a bill prevent its negotiation, but not its transfer; and here we see the importance of understanding the difference between transfer and negotiation. As I have explained more fully elsewhere, by the transfer of property, the person who receives acquires only the same title as the person who transfers; but by negotiation the person who receives acquires a perfect title so long as he takes for value and in good faith and in proper time (*see* pp. 457-8). It follows from this that the addition of the words “Not negotiable” renders the bill safe for transmission, but destroys the usefulness of the bill, as a bill, to the transferee. A bill marked “Not negotiable” is still transferable.

Another form of restrictive indorsement—a very common one—is, “Pay W. Jones for collection.” In such a case, the bill is of no use to anyone but Jones, who becomes your agent to present the bill for payment when it is due. Any defence that would have availed against you will avail against him; and he cannot transfer the bill at all. Another form is, “Pay W. Jones or order for collection.” In that case Jones may transfer, though not negotiate, the bill; and consequently anyone who takes it from Jones only takes such rights as Jones had. What rights had Jones? Well, his rights were to present the instrument for payment and to receive the money for it; but these rights are subject to his duty, as your agent, to forward the money to you. Let me give an illustration to make this clear:—

You, who live in Bristol, are the holder of a bill, accepted by Munnibagg & Co., of London, and you forward this bill to Gelliphish, your London representative, to collect when due, marking it, “Pay Gelliphish or order for collection.” Gelliphish indorses this bill to me. I have now the right to collect the money



from Munnibagg & Co., but as I only took the same title as Gelliphish, I must do what he would have been bound to do—namely, forward the money to you. In other words, you have restricted the negotiability of the bill, and made it transferable only. If it were not for the words “or order” it would not even be capable of transfer.

When you endorse a bill “Pay X Y for collection,” as X Y is your agent, any defence available against you will be available against him, as is shown by an old case:—Mr. Haselton was the holder of a promissory note payable on demand for £500. A thief robbed him of the valuable document, and, as is by no means uncommon, skipped across to Paris to get rid of his plunder. He managed to pass the note on to a firm called Odier & Co., of Paris, and these gentlemen sent it to their London correspondent “for collection.” When the London correspondent tried to collect the £500, however, payment was refused, and the said correspondent brought an action to enforce his claim. Now, there was no doubt that, as far as the London correspondent was concerned, he had received the note in good faith without any knowledge that it was stolen, and without anything to put him on suspicion. But the Court decided that this was not the point. The Londoner was only an agent to collect for his Paris principals; and the question, therefore, was, “Did Odier & Co. purchase the note in good faith?” On the evidence being sifted, it turned out that the Paris firm had bought the “bit of paper” for an old song, and in such circumstances as would show that they knew it to be stolen. You see, if a man comes to me with a £500 note or bill bearing the name of Rothschild, or the Bank of England, or Barclay, Bevan & Co., and offers to sell it to me for £100, I ought, as a reasonable man, to suspect that something is wrong. “No man could or would sell such a valuable document for such a price unless he had stolen it,” I ought to say to myself. Now Messieurs Odier & Co. had bought the note in question in some such suspicious circumstances as those I have mentioned, and it was therefore held by the Court that they had not bought the note in good faith. It follows that they were not entitled to demand payment of the money; and because they were not so entitled neither were their London agents. This instance ought to make it clear what are the rights of a person to whom a bill is indorsed “for collection.” An indorsement in those terms and for that purpose is not a negotiation; it is only a transfer, and a transfer for a limited purpose.

**The Rights and Liabilities of the Indorsers of a Bill or Note.**—Anyone who indorses a bill or note is liable to pay it, (1) if it is properly presented for acceptance or payment and is dishonoured, and (2) if proper notice of dishonour is given to him. Let us take an example:—A bill drawn by A upon B, accepted by B, the original payee being C; C has indorsed the bill to D, D to E, E to F, and F to G. G presents it to B for payment, and it is dishonoured; whereupon G at once gives notice to (say) F. F is now liable to pay G. But F is also entitled to proceed against any previous indorser (E, D, and C), or against the drawer (A); but he must at once give notice of dishonour to all those whom he intends to sue, just as G was obliged to give notice to him. As you will see by p. 478, this notice must be given promptly—

or, as the Act says, "with reasonable diligence"; and the time allowed is the same as that allowed to the holder. Suppose F knows that E is a safe man, quite able to meet the bill, he will probably give notice to E alone. Then E will give notice to D, C, and A. Or he need only give it to D, and then D will give notice to C, and C to A. It works out thus: G can "go for" F, E, D, C, and A; F has recourse against E, D, C, and A; E against D, C, and A; D against C and A; and C against A. In fact, any indorser who is compelled to pay the dishonoured bill has the right to compensation from any other indorser whose name was on that bill previously to his own, and from the drawer—provided always that he has no right against anyone to whom notice of dishonour has not been given. Sometimes the holder gives notice at the same time to all the indorsers, and when that has been done no further notification is necessary. Thus, if G gave notice to F, E, D, C, and A, and then makes F pay, F can come upon E or any of the others for compensation without himself giving them notice.

**Alteration of a Bill, Note, or Cheque.**—Let me warn my readers never to alter a bill, note, or cheque, for the consequences may be serious. I do not now speak only of such an alteration as would amount to a forgery, but also of an alteration made, perhaps, quite innocently. The law is, that when a bill, note, or cheque is materially altered, all the persons who were liable to pay up to the time of the alteration are set free of their liability, subject to the exception that I shall call attention to in a later paragraph. There are two things to which I would direct your attention; two questions that I would answer:—(1) What is a *material* alteration? (2) Who are the persons purged from their liability by that alteration?

The statute gives some instances of material alterations. It says, "In particular the following alterations are material—namely, any alteration of the *date*, the *sum* payable, the *time* of payment, the *place* of payment, and, where the bill has been accepted generally, the addition of a place of payment without the acceptor's assent." Lord Esher, Master of the Rolls, who had a large commercial practice at the Bar, once said: "Any alteration seems to me material which would alter the business effect of the instrument, if used for any business purpose." And, strangely enough, the acceptor, indorsers, and others liable on the bill are discharged from their debt if the alteration is made without their consent, even if it be for their benefit. Take this instance:—Mr. Plewtokrat is asked by Mr. Ceedy to lend him £10. "I can repay you in a couple of months," says Ceedy. Plewtokrat finally consents to lend the money, but for one month, not two. A promissory note is made out:—

£10.

One month after date I promise to pay Mr. Phineas O. Plewtokrat  
Ten Pounds.

May 1, 1897.

SEPTIMUS CEEDY.

A day or two afterwards Plewtokrat's heart reproaches him for that he was not more kind to poor Ceedy. "After all," he reflects, "the poor fellow was kind to me when I was hard up, and I can stand out of my money for two



months just as well as for one." And so, without consulting his debtor about it, he crosses out the word "one" and substitutes "two" in the promissory note. Of course, if the borrower be a decent fellow, he will accept the benefit with gratitude and pay up at the end of the two months. But he need not pay at all, because by materially altering the note, Plewtokrat released Ceedy from all liability under it. But as the note was altered without fraudulent motive, and Ceedy has lost nothing by it, Plewtokrat can sue him for money lent, leaving the note out of the question.

Now, take another case where the alteration is also without fraudulent intent, but where the result is far different. Micks borrows money from Dicks, and, as security, Dicks draws a bill in his own favour, which is "accepted" by Micks. This is the document:—

*£100* *Newcastle-under-Lyne, May 1<sup>st</sup> 1896.*

*Three months after date pay to my order the sum of*  
*One Hundred Pounds sterling for value received.*

*Accepted* *by Micks*

*Solomon Dicks*

*To Mr. Michael Micks, Merchant*  
*at Middletown.*

Upon this document Dicks lends Micks £97 10s., the other £2 10s. being deducted by way of discount or interest. On the 1st of June Dicks owes an account to Phix of £98, pays him by means of Micks's bill. Dicks, of course, indorses the bill and hands it to Phix, who thus becomes the "holder in due course." Now Phix, without any improper motive, and knowing that Micks keeps his account at Lloyds Bank, alters the acceptance (the words printed across) so as to read, "Accepted payable at Lloyds Bank." This he does without asking Micks's leave. Result: Phix cannot sue either Micks or Dicks on the bill. Nor can he make Dicks pay the £98 which was owing on the account. I have shown you (pp. 484-5) how, in ordinary circumstances, Micks could make Dicks liable; and then Dicks could "go for" Micks. But here, by Phix altering the bill, he has not only destroyed his own, but also Dicks's right against Micks, and therefore he (Phix) will not be allowed to sue Dicks. Therefore Micks's loan is discharged without his paying a penny.

Now let us take a rather more complicated case. Aggs draws a bill on Baggs for £100, which bill Baggs "accepts." Then Aggs indorses the bill to Caggs, who gives him £95 for it. Caggs alters the bill from "three months after sight" to "three months after date," and then, in turn, discounts it to Daggs, and indorses it. Daggs indorses again to Gaggs, and Gaggs to Haggs. Haggs takes the bill to Baggs to be paid, but Baggs refuses to honour it on account of the alteration. Please note that Baggs and Aggs signed the bill before the

alteration, but Caggs, Daggs, and Gaggs after. Therefore Haggs, the holder of the instrument, can claim his money from Caggs, or Daggs, or Gaggs, but not from Baggs and Aggs. Why? Because the persons aggrieved by the alteration were those who were liable to pay the bill before it was altered, so that they alone are discharged. Those who indorsed the paper after the alteration have not any reason to complain. They were not hurt, and so they are liable.

There is a *partial exception* to the rule that alteration discharges all liable before that alteration. It is this: when the bill comes into the hands of a "holder in due course"—that is, one who gives value for it, and takes it in good faith before it is overdue (*see* p. 458)—such a holder may avail himself of the bill as it stood before it was altered. Perfect "good faith" includes no negligence. Wherefore the alteration must have been one that could not be perceived, or else, however innocent is the holder, he can claim no rights on the bill. The great case on the subject was one which illustrates two main points of the law of negotiable instruments. The contending parties were Lord Londesborough and a gentleman of the name of Scholfield. The noble lord had a friend, a doctor, named Scott; and one day Scott asked Lord Londesborough to "accept" a bill for £500, which Lord Londesborough did. Scott had written out the bill on a stamped paper, but the stamp was not a 5s. one, which would have been sufficient to cover £500, it was a 40s. one—enough for a bill of £4,000. Moreover, the words "five hundred" were written with a space in front, and the figures £500 had also a space between the £ and the 5. Scott filled in the spaces like this: "Three thousand" and "3," and then took it to a financier to raise money on it—a process known as "flying a kite," I believe. Finally, the bill came into the hands of Mr. Scholfield, who, seeing that the amount was within the stamp value, seeing, also, Lord Londesborough's signature, and not seeing any alteration apparent on the face of the paper, cheerfully discounted it, and, in due time, presented it to Lord Londesborough for payment. Naturally enough, payment was not forthcoming, and Lord Londesborough denied liability for the £3,000, but offered £500. Mr. Scholfield declined to take it, and brought an action-at-law for the whole amount. He pleaded that even if the bill, when accepted, was only for £500, Lord Londesborough had been negligent—firstly in putting his name to a bill with a blank space before the amount; and, secondly, in "accepting" a bill for £500 written on a £4,000-stamped paper. "It was," said Scholfield's counsel, "leaving the door open to forgery." But the Courts all held that Lord Londesborough was only liable for £500. He was not, said the judges, in any way bound to be suspicious that his friend would commit forgery. Hence Scholfield lost heavily. Scott got something out of it, besides the money: he got five years' penal servitude. If the alteration had been one that Scholfield could have perceived, he would not have been entitled even to the £500; nor if he had been a party to the alteration.

This case leads me, quite naturally, to the subject of **Negligence, Forgery, and Fraud**, in connection with bills of exchange and other negotiable instruments. First, let me say that a forged or unauthorised signature to a bill is quite inoperative, and gives no rights to anyone, however *bona-fide* he may be. Thus, a note is given in this form: "I promise to pay James Anderson twenty



pounds.—THOMAS SMITH." The James Anderson to whom the note is given loses it, and it falls into the hands of another James Anderson, whom I will call Anderson the Second. Anderson the Second takes the note to Brown, who, seeing the name "James Anderson" on the note, and knowing his customer's name to be James Anderson, cashes the note for £19 10s., and Anderson the Second signs his name on the back. Brown, though he acted in good faith, has no claim whatever to the note, and cannot demand the money from Smith. Strange as it may sound to many of my readers, the signature of Anderson the Second on the back of the note is a forgery, though the man only signed his own name. It is a forgery because he pretended to sign the signature of the James Anderson to whom the note was payable, and he is not that person. So that you see a man may be guilty of forgery even when he signs his own name.

Now, let us take a peculiar case which excited a great deal of discussion and much difference of opinion in legal circles from 1889 to 1891. Let me premise my account of the case by the statement that if you happen to get hold of a bill, or note, or cheque in which the name of the payer is fictitious, that bill, note, or cheque is payable to the bearer, and may, therefore, be negotiated simply by delivery. For instance, if Mrs. Gamp writes a bill "Three days after sight pay Mrs. Harris or order the sum of, etc.," this is really a bill payable to bearer, because, as we all know, Mrs. Harris is a fictitious person. The result is that if that bill is taken to the acceptor by someone who had no right to it—had stolen it, for instance—and the acceptor pays him, it is a valid discharge of the bill. Now for the tough and curious case afore-mentioned.

There was in 1889 in the City of London a highly reputable firm of merchants named Vagliano Brothers, who had a customer whom we will call Bones. Bones was in the habit of drawing bills to the order of Jones & Co., using the name of Vagliano Brothers as drawees. Vagliano Brothers always accepted bills drawn on them by Bones, for Bones was a man of substance. In the employ of Vaglianos was a clerk—an unscrupulous scoundrel—who could write your own hand as well as you yourself could. This clever penman forged a bill purporting to be drawn by Bones, payable to Jones & Co. or order. He also forged a letter pretending to come from Jones & Co., forwarding the bill to Vagliano Brothers for acceptance. Nothing doubting, Vaglianos wrote across the face of the bill, "Accepted payable at the Bank of England.—VAGLIANO BROTHERS." The paper was handed to the clerk to post to Jones & Co., but he did not post it. He put it in his pocket, and to complete the chain, he forged a signature of Jones & Co. on the back, took it to the Bank of England, and was paid cash for it. Speedily he made his way to brighter climes, and before long the forgery was found out.

From this point the matter comes into the hands of the lawyers, for the amount was large, and neither the Bank of England nor Messrs. Vagliano cared to lose their money. One of them had to lose, however; and in the end it was the merchants who lost, not the Bank. But the fight was keen. The best legal champions who could be found in England were engaged. The argument in favour of Vaglianos was to this effect:—"This bill was made payable to

Jones & Co. You did not pay it to Jones & Co. or order. You did not pay it to the order of Jones & Co., for the indorsement of their name on the back was a forgery." To this the Bank replied:—"In the circumstances the name Jones & Co. was a fictitious one, because Bones never really drew a bill in favour of the real Jones & Co. That being so, the bill was one payable to a fictitious person, and was, therefore, payable to bearer. We paid the bearer, and therefore we are not liable." This shows that when the Act of Parliament speaks of a bill as made payable to a fictitious person, you are not to understand thereby a person who never had an existence, but a person who had no existence in this particular transaction.

The case would have been far different had Bones really drawn a bill in favour of Jones & Co., and sent it to Vaglianos for acceptance. Suppose the bill had been a real one, that Vagliano Brothers had accepted it, and then their clerk had stolen it and forged Jones & Co.'s indorsement and got the money, the Bank would have had to lose. The reason is that then there would be a forged indorsement of the name of real people. To sum up, if the bill is wholly forged, as Vagliano's was, the name of the payee is held to be fictitious, though there may be somebody who bears that name. If it were not so, it would be very difficult, almost impossible, to call any name fictitious. For instance, in the last few paragraphs I have made free with the name of Bones, using it as a fictitious name, though there may be, for anything I know to the contrary, many very real people rejoicing in that name: which causes me to remark how very careful authors ought to be in the use of names for appellations, however unreal-looking, that are not in actual use. I always think that the name of the villain or the fool of a book should be made as little like life as possible.

Now, I wish to take the case of a man who pays a bill under a forged indorsement. Smith draws a bill on Brown: "Pay Robinson or order." Robinson takes the bill to Brown, who accepts it, and on the way home a thief steals it, forges Robinson's name, and sells the bill to Jones. In due course Jones, who bought the bill in good faith, presents it for payment, and Brown pays him. Then Robinson discovers his loss, and he comes on Brown for the money. This he is legally entitled to do, because Robinson is, in law, still the true owner of the bill, and is entitled to the money; and Brown, having paid on the strength of a forged indorsement, has not, in law, paid the bill at all. Then Brown begins to excogitate, as thus: "I have paid this money twice over—once to Jones, who was not entitled to it, and once to Robinson, who was. I wonder if I can make Jones pay me back?" For my part, I do not think he can, seeing that Jones bought the bill in good faith. At the same time the point is a little doubtful, and there is no provision made for it in the Bills of Exchange Act. This is certain, that if Brown has been led to pay by the negligence of his correspondent or customer (namely, Smith, who drew the bill on him), Brown can claim compensation from Smith. And this also is certain, that if Jones did not take the bill in good faith—that is, if he ought to have suspected the theft, but shut his eyes to the facts—he will be compelled to refund the money to Brown.



As to the uncertainty mentioned above, there is one practical moral, which is, that the moment Robinson discovers the loss of his bill he ought to notify Brown. Provided he can do this before Jones has received payment, the matter is much simplified, for when Jones appears and asks for the money, Brown will politely inform him that the bill has been stopped, tell him of the theft, and point out that Robinson's indorsement is a forgery. Then Jones bears all the loss, for he cannot compel payment, having no more right to the bill than you have, though, once payment is made to him, Brown might not be entitled to his money back.

**Lost, Stolen, or Destroyed Bills and Notes.**—If you lose a bill or note belonging to you, you have not lost your right to the money, unless the paper gets into the hands of someone else who has a right to demand payment. If I lost a promissory note payable to me "or order," and not indorsed by me, I should at once go to the maker of the note, tell him all about it, and ask him to give me another note of the same kind. If he would not do it, I should compel him to do it by action-at-law; or else wait until the bill became due and payable, demand the money, and if it were not paid, bring an action for the amount. The Court would compel him to pay me, but would make me give some caution, or guarantee, or security, that if ever the bill did turn up, and he had legally to pay the holder, I would compensate him. The law was not always so. At one time, if the bill was lost, or stolen, or accidentally destroyed, I lost my money. The same law applies to lost, stolen, or destroyed cheques.

#### FOREIGN BILLS.

The bills hitherto discussed have all been "inland," namely, those drawn and payable in the British Islands (including the Isle of Man and the Channel Islands), or else drawn in the British Islands upon a person resident in the British Islands. All others are foreign bills.

Walker, of London, draws a bill upon MacFarlane, of Edinburgh, payable in Dublin. This is an inland bill.

Thompson, of Aberdeen, draws a bill on me, a resident in London, and I write across it, "Accepted payable at the Crédit Foncier, Paris." This is an inland bill, because it is drawn in Scotland on a man resident in England.

Yet again, I draw a bill in London on my friend Emil de Valon, of Amiens. If he writes across it, "Accepted payable at Robarts, Lubbock & Co.'s Bank, London," it is an inland bill. Should he simply write, "Accepted," it is a foreign bill; because, though drawn in the British Islands, it is not drawn on a resident in these islands, and is payable at Amiens; for if I write "Accepted," it means that you must bring the bill to me when it is ripe for payment.

If a bill has no indication of being foreign, you may always treat it as "inland."

The points of difference between English and foreign bills are not many. Bear in mind one international principle, and you have the key to the law of foreign bills of exchange. The principle is, that an act is legal when legally done by the law of the place where it is done, and not otherwise. Thus, if

Adolph Deschamps, of Paris, a gentleman of private means, and not a trader, indorses, accepts, or draws an accommodation bill of exchange in Paris, you cannot make him liable on it in England or Scotland, though he may have estates in Great Britain. Why not? Because by French law only real trade bills are recognised—not such as are used merely to borrow money on; and as, therefore, M. Deschamps' signature had no value when he signed it, it cannot become valid afterwards. Again, the indorsement of a bill (say) in France carries with it to the taker the French rights, though the bill may be an English one. Again, the duty of the holder of a bill as to presentment for payment, or presentment for acceptance, notice of dishonour, protest (*see* p. 492), varies according to the place where acceptance or payment ought to be made, or the bill is dishonoured, etc. For example, MacGregor, of Stirling, draws a bill on me (an English resident), but payable in Paris at Rothschild Brothers' Bank. (Note: this is an inland bill.) I "accept" the bill, and MacGregor gives it to M. Camisole, who presents it for payment at the Paris bank, where Rothschild Brothers refuse to pay it. By English law, Camisole ought to give me immediate notice of dishonour; but by French law there is no such necessity; and, as the dishonour took place in France, the French law governs the case. In Britain again, when a bill is dishonoured by non-acceptance (p. 476), notice ought to be given to the drawer. But in Spain, for example, no such notice need be given. Therefore, when Rouquette gave to Horne a bill drawn on a Spanish merchant, and Horne indorsed it to Don Miguel, and when the bill was presented for acceptance in Spain the merchant declined to honour it, it was held unnecessary for Don Miguel to give notice of the fact to Horne. He could bring an action in England without notice.

Again, no "days of grace" (p. 458) are allowed in France; and so if you, in Scotland, give me, in England, a bill dated March 1st, payable in Paris, I must present it for payment on April 1st—not on April 4th, as I should if it were payable in London.

All formalities in the form of the bill itself must be carried out according to the law of the country where the bill is drawn. For instance, the French code requires all bills of exchange to express on the face of the bill the value received. The German code does not. Therefore, a bill of exchange drawn in Berlin by a German merchant, payable to a Frenchman in Paris, is good, though it does not show any value received. Moreover, in France a bill of exchange is not valid if it be drawn and payable in the same place. Thus, if M. Alphonse Angot, of Paris, draws a bill on Rothschild Brothers, of Paris, it has no validity, because it is drawn and payable in the same place. Nor could that bill be enforced anywhere else (in England, for instance), because it was bad when and where it was drawn. The French theory of a bill is that it is an instrument to be used by merchants to prevent them from having to carry large quantities of coin about from one town or country to another—which was, as we have seen, the original design of bills. Consequently the law of France does not recognise bills that are made simply as a means of borrowing money on. And, finally, the French law does not allow bills payable to bearer. They must be payable to order.



So much for foreign laws of exchange. But I principally wish to point out to my readers how they are to act if a foreign bill comes into their hands in the United Kingdom. Take this case:—John Jackson, of London, has dealings with Pardessus, of Bordeaux. Jackson despatches merchandise to Pardessus, and Pardessus sends in return a bill:—

Francs 1,000.

Bordeaux, 1st April, 1897.

Three months after date pay to the order of John Jackson the sum  
of one thousand francs for merchandise received

To Rouquette & Co.,

E. PARDESSUS

London.

Jackson takes this bill to Rouquette & Co. in London, and they write across it "Accepted." Then on the 4th of July Jackson presents the bill to Rouquette's again for payment, but they do not pay, and Jackson hears that they are in difficulties. So he wishes to fall back on Pardessus, the drawer of the bill, for the money. Now if this were an inland bill, all that Jackson need do would be to write at once to Pardessus, giving notice of dishonour (p. 476); but as this is a foreign bill, Jackson must "protest" it; and if he does not protest it, Pardessus is discharged from liability.

**Protest and Noting.**—A protest is a document drawn up by a notary, who is a kind of semi-public officer who, except in London, frequently combines with his notarial functions the profession of a solicitor. To him you go with your foreign bill, and he takes the paper to Rouquette & Co. and formally demands the money. They again refuse to pay, and he "protests" then and there against the refusal. Then he proceeds to his office, and draws up in writing an account of the transaction, stating the reason given by Rouquette & Co. for not honouring the bill.

Protest must be made the same day that the bill is dishonoured. Therefore, when you have a foreign bill which is refused payment or acceptance, hie to the nearest notary and ask him to protest it for you. If, owing to unavoidable circumstances, you cannot protest the bill the same day, do it as soon as these circumstances are removed. It is not necessary to "protest" a foreign promissory note.

#### STAMP DUTY.

All inland bills and notes must be written on stamped paper, which you can buy at the Inland Revenue Office or the Post Office. The amount of the stamp varies according to the amount of the bill or note; and, in the case of a *bill*, there is a difference between bills payable on demand and others.

	£	s.	d.
Bills of exchange payable on demand (including cheques)	...	...	0 0 1
All promissory notes, and bills not on demand:—			
Not exceeding £5...	...	...	0 0 1
Exceeding £5 and not exceeding £10 ...	...	...	0 0 2
" £10 " " £25 ...	...	...	0 0 3
" £25 " " £50 ...	...	...	0 0 6
" £50 " " £75 ...	...	...	0 0 9
" £75 " " £100 ...	...	...	0 1 0
" £100, for every additional £100 or part of £100 ...	...	...	0 1 0

Thus a bill payable, say, a month after date, for £101, would pay 2s. duty—the same as a bill for £200.

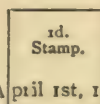
A foreign bill, to be enforced in Great Britain, must bear a British stamp. An adhesive stamp may be used, and it must be put on the instrument as soon as it returns from foreign parts. If you want to enforce a bill drawn (say) in France in an English or Scottish Court, the Court will not listen to the objection that by French law the bill ought to bear a French stamp. British Courts do not pretend to enforce the revenue laws of other countries.

### CHEQUES.

A cheque is a bill of exchange, drawn upon a bank or banker, payable on demand. You know the form of a cheque. It is generally written upon a form supplied by the particular bank on which the cheque is drawn, which form bears in one corner an impressed penny stamp. I have heard people, by way of excuse for not giving a cheque, say, "I have left my cheque-book at home, but I will send one on," or something of that kind. They appear to think that nobody can write a cheque except upon one of the forms in a cheque-book. This is quite a mistake. If anyone owes you money, and you get him into a quiet corner and talk to him, and he promises to send you a cheque—"Have left my cheque-book at home"—just take a piece of paper and a penny stamp, put the stamp on the paper, ask the gentleman for the name of his banker, and if he says National Bank of Timbuctoo, Charing Cross Branch, write these words:—

To the National Bank of Timbuctoo,  
Charing Cross Branch.

London, April 1st, 1897.



[or whatever the date may be.]

Pay Mr. William Brown Twenty Pounds Ten Shillings sterling.  
£20 : 10 : 0.

And ask your debtor for the favour of his signature. This is a perfectly good cheque, as valuable as if it had been written on a form from a cheque-book.

A cheque being merely a particular kind of bill of exchange, the rules about negotiation hereinbefore given apply to cheques; and also the rules as to notice of dishonour. There are, however, a few points in which the law relating to cheques differs from the law relating to ordinary demand bills. The first is as to the **time within which a cheque must be presented for payment**. The rule is, that a cheque must be presented to the bank for payment within a reasonable time after the date thereof. If not, what happens? Well, if the giver of the cheque suffers any loss through the delay, he can deduct that loss from the amount due on the cheque. Take an instance. Mr. Baker gives you a cheque for £100, drawn on the Gimcrack Bank, where he (Baker) has about £1,000 to his credit. Instead of taking the cheque to the bank at once and asking for payment, you keep it in your cash-box for a



fortnight. Then the Gimcrack Bank closes its doors and suspends payment—another way of saying that it has not sufficient money to pay its debts. In the end the assets are all realised, and the defaulting institution pays its creditors ten shillings in the £; so that Baker will receive £500 in place of the £1,000. What is your position? Had you presented the cheque promptly, you would have had the £100. This would have reduced Baker's balance to £900, and he would have got a dividend of £450. So that, if he is compelled to pay you the whole face value of the cheque, he will lose £50. But as this loss is caused by you, you must bear it, and not he. The way of doing it is this:—Mr. Baker is discharged from all liability on the cheque, but you are allowed to become a creditor of the bank for £100 in his shoes. You will, therefore, receive £50; and he will receive his £450, just as though the cheque had been duly cashed.

In one case you would lose your money entirely. Suppose Mr. Baker had no funds at the bank, but had been told that he might overdraw. Had you presented the cheque promptly, you would have been paid; but you did not, and have therefore lost your money. You cannot "go for" Baker. He is released from liability to you, because of your negligence. You cannot claim to be a creditor of the bank on your own account, because it never owed you anything. You cannot claim in Baker's shoes, because the bank does not owe anything to him either.—Q.E.D. I advise you to frame that cheque, hang it up in your office as a memorial, show it to your eldest son, and, as you tell him the story, point thus the moral: "Let this be a warning to you, my son, never to put off till to-morrow what you can do to-day."

What is a reasonable time within which a cheque must be presented? I would have you know the strictness of the law in this regard. If you live at Bristol, and someone on Monday gives you a cheque on the Bristol branch of the Bermuda Bank, it will not be reasonable if you delay asking for payment until after Tuesday. Tuesday is the last reasonable day. If the cheque is drawn on the London branch of the Bermuda Bank, you ought to send it to London, taking care to post it not later than Tuesday. Your correspondent in London will receive it on Wednesday, and he must hie him to the counter of the Metropolitan branch not later than Thursday. In very exceptional circumstances a few days of delay will be pardoned, but not often. The safest thing to do, if you have a banking account, is to pay the cheque into your own bank the same day or the day after you receive it. Your bankers will use all diligence in extracting the cash.

I do not say that a cheque is valueless if it be not presented in a reasonable time. If I give you a cheque dated the 1st of January, 1896, drawn on the Bank of Encheater, you can cash that cheque at the bank any time before the 1st of January, 1902 (six years), provided the Bank of Encheater has not suspended payment in the meanwhile. One thing you cannot do: You cannot negotiate a cheque that has been in circulation for more than a reasonable period. This will be found more fully explained in the paragraphs relating to ordinary bills payable on demand (pp. 460-2). If anyone brought me a week-old cheque and asked me to cash it (*i.e.* wished to negotiate it to me), I should

have great qualms about the matter, and should certainly decline the business unless I knew the man with whom I was dealing. I will tell you why. Suppose the man in question, whom I will call Mr. Strange, comes to my shop to purchase £3 worth of goods, and offers in payment a cheque signed "Westminster," bearing date a week before. Of course, I know that the Duke of Westminster's cheque is practically as good as cash, but I do not know how Mr. Strange became possessed of the cheque. And as, owing to its age, the piece of paper is merely transferable, and not negotiable, if it should turn out that Mr. Strange stole the cheque from the rightful owner—as I am in no better position than he, I have no more right to the cheque than he had. If the date were more recent—as, for instance, if it is the 4th of September, and the cheque bears date the 3rd or 2nd—I could take it safely. Why? Because it is negotiated to me (not simply transferred), and, unless I have notice of the fact of the theft, the cheque is mine. Another way of expressing the same state of facts is to say that when I take an overdue cheque (*i.e.* a cheque unreasonably old), I have notice of all defects in title attaching to it. This means that although, in the case just given by way of illustration, I did not actually know the cheque to have been stolen, yet if I take it from Strange when it is a week old or more, the law will presume that I knew. Consequently I shall not be a *bonâ-fide* holder.

Moral: Be very careful how you cash or change a cheque more than a few days old.

Another point in which the law of cheques is peculiar (using the word in its classic sense) is in the matter of **Crossed Cheques**. I want to show you what is the exact value of crossing a cheque, the different modes of crossing, and how to cross a cheque so as to make it of no value except to the person for whom it is intended. A few diagrams will illustrate the meaning of the text here.

## I.

Form of a Cheque crossed "generally" (Common Form)

<p>To the Bank of Bohemia, Limited, Fleet Street Branch.</p> <p>Pay Simeon Snacher or order</p> <p>£50. 0. 0</p>	<p>£</p>	<p>London, April 2<sup>nd</sup> 1897</p> <p>Stamp</p> <p>Fifty Pounds sterling</p> <p>Thickney Deane</p>
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This form (No. I.) is what the Act of Parliament calls "a cheque bearing across its face an addition of the words 'and Company,' or any abbreviation



thereof between two parallel transverse lines"—a cumbrous-looking but exactly correct description. I may say that by virtue of the same statute the two transverse lines have the same effect if the words "& Co." are left out. In each case it is a "general" crossing.

Now, what is the effect of the "general" crossing above described? Well, it is merely this, that the cheque can only be paid by the Bank of Bohemia to another bank. If the Bank of Bohemia pay cash across the counter to the holder of the cheque, and it should turn out that he had no right to the cheque, the Bank of Bohemia will be liable to repay the £50 to Mr. Thickeray Dackens, or Mr. Snacher, or to whomsoever was entitled.

Suppose Mr. Simon Snacher loses the cheque, after having indorsed it, and it is picked up by Mr. Fagin. Mr. Fagin disposes of the cheque to Mr. Fense, who took it (as far as you are able to prove) in good faith and for value—mind, not necessarily full value. Mr. Fense pays the cheque into his bank, the Bank of Chutneypore. The Bank of Chutneypore presents it to the Bank of Bohemia for payment. The Bank of Bohemia must pay it; or, if Mr. Thickeray Dackens has "stopped" the cheque (p. 509), he must be prepared to fight and to lose an action; for Mr. Fense will promptly give him notice of dishonour, and sue for the money; and he will be bound to win, because he is a holder for value, in good faith, and (this I presume for the sake of the argument) he took the cheque within a reasonable time after it was drawn. He is, accordingly, a holder in due course. Therefore, as far as paying the cheque is concerned, the "general" crossing has proved no protection to Mr. Simeon Snacher, the true owner. But, because the cheque was presented by the Bank of Chutneypore, Snacher will be able to find out the name of the customer for whom it is presented, and having found Fense, the latter will probably be able to remember from whom he received the cheque; and if that is the case, and Snacher can lay hold of Fagin, he may recover the money from that worthy, and perhaps see him safely lodged in gaol to boot.

But suppose Snacher lost the cheque without having indorsed it. Fagin finds it, forges the signature, "Simeon Snacher," on the back of the cheque, and sells it to Fense. Fense pays it into the bank as before, and his bank presents it for payment. But Snacher having told Dackens, the latter warns the Bank of Bohemia, and the Bank of Bohemia refuses to pay. This refusal is justified. Why? Because the cheque could not be negotiated to Fense without Snacher's indorsement (*see* "Bills Payable to Order," p. 459); and as the signature on the back is not Snacher's, but only a fraudulent imitation, the cheque never was negotiated to Fense at all.

Suppose Snacher discovered his loss too late to warn the Bank of Bohemia, and it, believing the cheque to be properly indorsed, pays the money to the Bank of Chutneypore for Fense. Snacher is able to trace Fense through the banks, and can recover the amount of the cheque from him.

So we see that the chief use of crossing a cheque "generally" is to enable anyone concerned to trace the person who receives payment, and, through that person, to trace all the hands through which the cheque has passed. But the cheque is still negotiable, notwithstanding the "general" crossing.

## II

*Form of a Cheque crossed "specially"*

<p><i>To the Bank of Bohemia Limited, Fleet Street Branch</i>  <i>Pay Simeon Snacher or order Fifty Pounds sterling.</i></p> <p><i>£50. 0. 0</i></p>	<i>Bank of Chutneypore &amp; Co.</i>	<p><i>London, April 2<sup>nd</sup> 1897.</i></p> <p><i>Duckery Thickens</i></p>
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You observe the difference between this and No. I. In addition to the two parallel transverse lines and the words "& Co.," you insert between the lines the name of a particular bank—in this case the Bank of Chutneypore. The result is this: the Bank of Bohemia cannot pay the cheque to anyone else except to the Bank of Chutneypore, and, as I shall show you hereafter, the Bank of Chutneypore can only collect it for a customer. That customer need not necessarily be Mr. Simeon Snacher. It may be anyone who has an account with the Bank of Chutneypore. Of course, it will be a little awkward for Mr. Snacher to cash the cheque unless he himself has an account at the Chutneypore Bank, because he will be obliged to find out someone who banks with that institution, and negotiate it to him. To show you what I mean, from that best of guides, personal experience. A client of mine sent me a cheque for £3 5s. 6d. [three guineas for myself, and half-a-crown for my clerk's fee], and he crossed it "Barclay, Bevan & Co.," being under the impression that I banked at that well-known establishment. As a matter of fact I do not bank there. But I asked a friend if he knew anyone who had an account at Barclay, Bevan & Co.'s bank, and, fortunately, he did. So I indorsed the cheque, my friend gave me £3 5s. 6d. for it; then he took it to his friend, who gave him £3 5s. 6d. for it, and his friend paid it in to his account at Barclay, Bevan & Co.'s, and they collected the money for him. Rather roundabout, was it not? But the only alternative was for me to send the cheque back to my client, and ask for another crossed to my own bank—Messrs. Dunow, Limited.

By crossing a cheque "specially," you reduce the risk from dishonesty to a minimum; but you do not take it away altogether, because, in spite of the special crossing, the cheque remains negotiable. The following instance will show you what I mean:—The Civil Service Co-operative Association owed Mr. Smith £21 9s., for which amount the directors drew a cheque to "Mr. Smith or order," and crossed it "London and County Banking Co.," where Mr. Smith had an account. Mr. Smith wrote his name across the back of the cheque, thus (p. 481) making it payable to bearer, and sent his servant to his (Smith's) bank to



pay in the piece of paper. On the way, a thief picked the pocket of Mr. Smith's servant, and, as lawyers put it, "stole, took, and carried away" the £21 9s. cheque. Mr. Thief sold his booty to a Mr. Robert Thurger for £8 10s., and Thurger resold it to Mr. Jinks for £21 9s., the full face value. There was no doubt that Mr. Jinks cashed the cheque in good faith, though one might very well have doubts as to the *bona fides* of Mr. Robert Thurger. Mr. Jinks paid the cheque in to his bank, and his bank collected the money from the Union Bank of London, on which the cheque was drawn. Said Mr. Smith to the Union Bank, "You ought not to have paid; the cheque did not belong to Jinks, but to me, and therefore you must pay me, whether you have paid him or not." But the Courts decided that the mere crossing of a cheque "specially" did not render it not negotiable, but only payable through a particular bank; and that Jinks was lawfully the owner, because the instrument had been negotiated to him *bona fide* and for value.

If, in addition to making a cheque payable only through a bank, you wish to protect the payee still more, make it out as follows:—

## III.

*Form of a Cheque crossed specially and restrictively.*

<p><i>To the Bank of Bohemia Limited, Fleet Street Branch</i>  <i>Pay Simeon Snacher or order Fifty Pounds sterling.</i>    <i>£50. 0. 0</i></p>	<p><i>Bank of Chutneypore.</i>  <i>Not Negotiable.</i></p>	<p><i>London, April 2<sup>nd</sup> 1897.</i>    <i>Sacker Thickers</i></p>
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This cheque can hardly go wrong. In the first place, no one can get the money except through the Bank of Chutneypore. In the second place, as the cheque is not negotiable, it can merely be transferred. So that if Simeon Snacher indorses it, and sends it by the office boy to his bank—which must be the Chutneypore—and a thief robs the boy and sells the cheque (even for full value) to Jinks, and Jinks (who also deals at the Bank of Chutneypore) in the best of good faith pays the cheque into his account for collection, and the Bank of Chutneypore (also in good faith) present it to the Bank of Bohemia, and the latter (in good faith, again) pay the amount, Jinks must refund the money to Snacher. Why? Because, the cheque not being negotiable, Jinks only bought the rights of the seller. But the seller to Jinks was a thief, and had no rights at all. Argal, Jinks has no rights at all. Once more—Jinks having received money to which he had no right, must return

it, or hand it over to the man who had a right to it. Therefore, Jinks must hand over to Snatcher £50. Rather rough on Jinks? Yes; but it served him right, for carelessly cashing a "not negotiable" cheque. So that, provided the man who ultimately receives the money from the bank can be got at, the cheque crossed "not negotiable" is a very safe thing.

Still, it has been known to happen that such a cheque has gone astray, with evil results to the loser. Suppose, for example, that Jinks's account at the Chutneypore Bank is a very small one, with about £2 on the credit side. Jinks pays in the £50 cheque, his bankers receive the money for it from the Bank of Bohemia, and then Jinks draws a cheque on his own bank for £50—that is, he draws out the £50 which was received for the £50 cheque of Mr. Dackeray Thickens. Snacher, as I say, has a perfect right to recover the money from Jinks, if he can. But it may be that Jinks is poor. He spends the £50 as soon as he gets it, and is not worth the trouble of going to law with. Well, I am afraid Mr. Snacher will have lost his money. He cannot get it out of Jinks, because, as the French say, it is useless to shave an egg. I have been asked whether he has any remedy against the Bank of Bohemia or the Bank of Chutneypore. I fear not. For bankers are protected from liability in cases like these so long as they act without negligence and in good faith.

As soon as Mr. Snacher knew the piece of paper to be amissing, he ought at once to have "stopped" it—that is, to have written to the Bank of Bohemia ordering them not to pay it, and informing them of the theft. Of course, the latter must describe the cheque so as to identify it; the best way is to give the date, amount, state the name of the drawer and that of the drawee, and when it was lost. If, after receipt of such a notice, the Bank of Bohemia should pay the cheque to anyone, they will be liable to refund the amount to Snacher, for it is negligence on the part of a banker (unless in very exceptional circumstances) to cash a "stopped" cheque, or one of whose theft or loss they have had notice; but if they have no notice of such theft or loss, they are held harmless. This is a measure necessary, as it seems to me, for the protection of bankers and for the carrying on of commerce. It would hardly be worth while to keep a bank if the banker had to be used as a sort of target for everyone to shoot at.

So far, we have considered certain forms of crossing, each of which affords considerable protection both to the drawer and indorser of a cheque; but none of those modes hitherto described affords complete protection to all parties concerned. By *complete protection* I mean this: protection to the drawer of the cheque by insuring that it reaches the hands of the payee, and protection to the payee by insuring that he shall not lose his money through any person's dishonesty. I will now proceed to show you how a cheque may be crossed in such a way as to make it absolutely safe.



## IV.

*Form of a Cheque crossed restrictively, and not negotiable or transferable.*

<p><i>To the Bank of Bohemia, West Street Branch.</i></p> <p><i>Pay Mr. Simeon Snacher, or order</i></p> <p><i>£50, 0, 0</i></p>	<p><i>v. Co.</i></p> <p><i>payee's account only</i></p>	<p><i>London, April 1<sup>st</sup> 1896.</i></p> <p><i>Fifty Pounds sterling</i></p> <p><i>Deakins Thicket</i></p>
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My readers will see that between the two parallel transverse lines are written the words "payee's account only." As already explained, the effect of the lines is to make the cheque payable only through a banker. "Payee's account only" means that the Bank of Bohemia can only pay the cheque to a bank where Mr. Simeon Snacher has an account, and Mr. Simeon Snacher's bank can only receive the money in order to place it to Mr. Snacher's credit. It necessarily follows that if the cheque be lost or stolen, even if Mr. Snacher has indorsed it, it is of no more use to the finder or the thief than a piece of waste paper.

To Snacher himself such a cheque is only waste paper if he does not happen to have a banking account. The following case, which occurred as recently as 1894, will show why:—Messrs. Williams & Co. are bankers in Leeds. To them one day went a stranger who produced a crossed cheque, and asked the bank to cash it for him. He was told that he must take it to his own banker to collect, but he answered that he had no banking account. The clerk at the counter then advised him to get a friend to cash it, but he replied that he had no friend in Leeds, or, at least, no friend with £100 at his disposal. The stranger was a man of good manners and appearance, and persisted in his request until the following arrangement was come to:—Williams & Co. allowed him to open an account with them. He paid the £100 cheque in to the credit of that account. At the same time he drew a cheque for £100 payable to himself, and received cash for it there and then. Lastly, he paid the not very extravagant sum of one shilling to the bankers for their trouble. That was all, so far as the gentlemanly stranger was concerned; but Messrs. Williams & Co. had by no means heard the last of it. They presented the cheque to the bank upon which it was drawn, and received the £100 in due course. But very soon it appeared that the gentlemanly stranger had obtained the precious bit of paper by some kind of knavery from a Mr. Matthews. Mr. Matthews took the trouble to have the peregrinations of the cheque traced, and successfully tracked it to Williams & Co. He very naturally asked these

gentlemen for the name and address of the customer for whom they had collected the money. To his amazement they could not furnish him with the address, though perfectly able to supply the name—or what they thought was the name. This astounding state of ignorance moved Mr. Matthews to send to Messrs. Williams & Co. another piece of paper, bearing the seal of Her Majesty's High Court, and commonly termed a writ. The worthy bankers were thus compelled to appear before the judge, and show cause why they should not pay to Mr. Matthews the sum of £100. They pleaded in defence that according to Act of Parliament they were protected, because they had in good faith collected the money for a customer. "A customer!" said his lordship in effect; "a nice sort of customer. A customer of a banker is one who has an account with him. The man from whom you received this cheque never had a real account with you. It was a purely fictitious account. Such 'accounts,' if allowed, would take away the very protection intended to be conferred by crossing a cheque, and would render that precaution of no avail." Wherefore judgment went against Williams & Co., and they lost their £100—or, to be quite correct, their £99 19s. True, they might have recovered it from the gentlemanly stranger, if they could find him. But do you, my guileless reader, think that they ever found him?

Had this rogue been, in truth, a customer, Messrs. Williams & Co. would have incurred no liability. And this seems to me the proper place to say a word or two about the liability of bankers with regard to their customers' cheques.

**Forged cheques and forged indorsements.**—Suppose you are the lucky possessor of a banking account with the Bank of England, having, I sincerely hope, a fat balance. You owe me £1,000, and send me a cheque for that amount payable to "Mr. C. F. Loryer or order." I happen to have a dishonest clerk, who opens your letter, forges my indorsement on the back, takes the cheque to the Bank of England, and receives 100 ten-pound notes or 1,000 golden sovereigns. There is nothing to awaken suspicion in the mind of the unsuspecting bank clerk, or, you may be sure, he would not part with the money. The bank cannot in any way be liable for the loss, either to you or me, for the Bills of Exchange Act says, "Where a cheque is presented for payment which does not appear to be crossed, *the banker* paying the cheque in good faith and without negligence shall not be responsible or incur any liability."

And if the cheque is crossed, and my servant indorses it to someone who has an account at the bank, and that person through his bank obtains payment from the Bank of England, the Old Lady of Threadneedle Street, as the Bank of England is affectionately termed, incurs no liability, unless she acted negligently or in bad faith.

The last two paragraphs, as you will see, apply to cheques with a genuine signature of the drawer, but a forged signature of the indorser. If the cheque is a forgery to begin with, the banker who pays it must lose. Thus, my servant forges my signature to a cheque on my bank, presents it, and receives the money. We will suppose the forgery to have been so skilful that it would have been



almost impossible to detect it, so that it really was no negligence on the part of the bank clerk to honour the cheque. Still, it is the bank that must bear the loss, not I. It is an old wife's saying that there are more ways of killing a dog than by hanging him; so also there are more ways of forgery than by forging a signature. I know the popular conception of forgery to be that of merely imitating somebody's signature, but this is too limited a notion. It is forgery to alter any document for fraudulent purposes. Suppose I sign a cheque for £3 and give it to you, and you insert the word "fifty" before the word "three" and the figure 5 before the figure 3 in the left-hand bottom corner, in order to make the cheque appear to be one for £53, you have committed forgery just as much as though you had imitated my signature at the foot of the cheque. In other words, if with intent to defraud, you alter a genuine document, it is just as bad as manufacturing a document altogether false.

Now, suppose, after altering the cheque from £3 to £53, you present it at my bank and deceive the bank official into paying you the £53, the banker cannot charge the £53 to my account; he must bear the loss himself. The only case in which my banker can compel me to bear the loss caused by his paying a forged cheque is where I have been so negligent as practically to have been guilty of a fraud, or, at all events, so negligent as to disentitle me from defending the action. Let me show you how such a thing may happen. Jones has a confidential clerk, and when Jones takes Mrs. Jones and the children to Bandham-super-Mare for the month of August, he leaves the confidential one in charge; and he also leaves at the office a couple of cheques, signed, but with the amounts and dates left blank, giving instructions to the man in charge to fill them in and cash them when money is required for wages, office expenses, and the like. Jones has nothing to fear if the clerk is perfectly honest; but if I were Jones I would not give blank cheques to a clerk unless I had a very substantial guarantee from a Fidelity Insurance Office. For if the clerk fills up one of the cheques "Pay self or order £1,000," and the bank honours the cheque, and the confidential man goes for a permanent holiday in parts unknown to Jones, Jones will be £1,000 the poorer. He (Jones) cannot make the bank liable in any way, because he has been guilty of gross negligence. Now look at this case, which did not actually occur in the case of a cheque, but it happened in the case of a bill, as described in Lord Londesborough's case on page 487. Jones fills in a cheque:

<i>Glasgow, April 1, 1897.</i>	
TO THE CITY OF GLASGOW BANK.	
Pay Andrew Macdonald or bearer	
£        100	One Hundred Pounds. JAMES M'GREGOR JONES.

You observe that "one hundred pounds" is written at the end of the line, leaving plenty of room to prefix the words (say) "three thousand," and that the "£100" in left-hand bottom corner is written in such a way as to leave space for another figure. Now if Andrew Macdonald is a dishonest man

and a skilful forger, he may easily fill in the spaces by adding "three thousand" and "3," so as to make the cheque look like one for £3,100. So skilful is his forgery that the expert bank clerk is deceived, and he hands over £3,100 to Andrew Macdonald, who makes himself as scarce as he can—and we all know what a convenient city Glasgow is to get away from. When James M'Gregor Jones has his bank pass-book made up he discovers the fraud. Who is to bear the loss: the City of Glasgow Bank, or Jones? This depends on the answer to the question, Was the alteration apparent? If not, the bank will not be liable for the loss. If it was apparent—that is, if the bank officials ought to have smelt a rat—the bank loses. But if the forgery were as skilful as I have described, probably there was no negligence on the part of the clerk who honoured the cheque, and therefore Jones is the loser. He has himself to blame, because no one but a lunatic or a drunken fool would let loose a cheque in the condition described.

In the case of a bill or note the case is different, as you will see from page 487. I need hardly say that Andrew Macdonald is liable for the £3,000, if he can be found; and he is also entitled to a long period of board and lodging—"everything found; live in," as certain advertisements put it.

The point is, that a banker who honours a customer's cheque is not responsible for any loss caused by the cheque being altered, or the indorsement forged, so long as that banker pays the money in good faith and without negligence—provided that the alteration was (*a*) not apparent and (*b*) caused by the negligence of the customer.

This protection only extends to bankers. If Andrew Macdonald, after committing his little forgery, instead of taking the cheque to the City of Glasgow Bank, persuades a friend to cash it for him, and the friend takes the cheque to the City of Glasgow Bank and receives the money, though the bank is safe from all liability, the friend is liable to repay the money to Jones.

**Post-dated cheques** have been a subject for anxious thought on the part of the Legislature and the Courts. In 1867 a case arose in which X had given to Y on (say) the 1st of March a cheque dated the 1st of April. A dispute arose between X and Y, and they went to law. X then contended that the cheque, being post-dated, was of no value, and he succeeded. Let me tell you why. A bill of exchange for £100 payable one month after date has to bear a shilling Government stamp. A bill or cheque payable on demand has only to bear a penny stamp, a loss to the revenue of elevenpence. Now if I, on the 1st of March, give you a cheque for £100 dated the 1st of April, payable on demand, that is only another way of giving a bill dated the 1st of March, payable one month after date. The judges, then, held that X ought to have given Y a bill payable in a month, and not a cheque post-dated a month, since the latter was merely a device for infringing the revenue laws. But by the Stamp Act of 1870 this device has been legalised, and a post-dated cheque is now lawful.

A word of advice to Londoners:—Never take a cheque drawn on a bank in the City of London and marked "post-dated," and never draw a cheque on a London bank and mark it "post-dated." A certain Mr. Emmanuel had an account with Robarts, Lubbock & Co., the well-known firm in the City of London. One day Mr. Emmanuel gave a cheque to someone, which cheque he dated some



time ahead ; and to show, I suppose, the *bona fides* of the instrument, he wrote on it "post-dated." When the date came round, the holder presented the cheque at Robarts and Co.'s bank for payment, but, although Mr. Emmanuel had sufficient funds to his credit, payment was refused. The holder speedily ran round to Mr. Emmanuel and reproached him for giving a cheque which was dishonoured when presented. Thereupon Mr. Emmanuel brought an action against Robarts & Co. for having damaged his credit and reputation by refusing to cash his cheque when they had plenty of his money in hand to meet it. The defence was, that it was the usage of the trade amongst City of London bankers not to honour cheques marked "post-dated" ; and the defence succeeded. For, as I have stated, a usage of a trade, provided it be not flagrantly unreasonable or dishonest, is good law in Great Britain, on both sides of the Border (p. 326). His Honour Judge Chalmers, the draughtsman of the Bills of Exchange Act, 1892, in his book on Bills of Exchange, says, "Query, since the Stamp Act, 1870, if cheque is not presented before its nominal date," by which he means that possibly the Stamp Act of 1870 overrides the decision of the Court in Emmanuel's case. This view may be correct ; but I do not advise any reader of mine to put it to the test, unless he has a hankering after immortality. Most men, I imagine, will prefer avoiding a lawsuit and a lawyer's bill to being immortalised in the pages of the Law Reports as plaintiff or defender in a "leading" case. Therefore, in case you give or take a post-dated cheque drawn on a bank in the City of London, see that it be not marked "post-dated." Moreover, if you have a cheque, really given to you on the 1st of March, 1897, but dated 1st of April, 1897, be careful not to present it for payment until the 1st of April, 1897—at all events, in the City of London. If you happen to want the cash, try to procure it from a friend, and negotiate the cheque to him. Mind, the Act (s. 13) provides that a bill (including a cheque) is not invalid merely by reason of *being* post-dated. The point raised in this paragraph is not that. It is, whether or not, when the words "post-dated" are written on it, the cheque may be refused honour by a City of London banker. To my mind it is very doubtful.

**Your banker must honour your cheques**, so long as he has sufficient funds of yours in his hands to meet them. There are some exceptions to this rule, but unless in one of the exceptional cases (*see* below), the liability of a banker for not paying a customer's cheque is, or may be, very heavy. An old case, which is still good law, decides that there is a contract between the banker and his customer for the banker to honour the customer's drafts so long as there is a sufficient amount in hand to meet them. It follows that if the banker fails to honour a cheque, he has committed a breach of contract, and is liable to pay damages. The case referred to was that of Marzetti against Williams & Co. Marzetti banked with Williams & Co., and on the day in question he had, in the morning, about £69 to the credit of his account. At one o'clock he paid in a further sum of £40. Two hours afterwards a man, to whom he had given a cheque for £87, presented it at Williams & Co.'s counter for payment. One can only suppose that some clerk had forgotten or had not had time to enter the £40 in the books, for the clerk to whom the £87 cheque was presented returned it to the holder, remarking, "There are not sufficient funds to meet this ; but if you pay

it into your bank, it will probably be cleared to-morrow," meaning that by the next morning Mr. Marzetti would probably have paid in more money. When Marzetti heard of it he was naturally indignant, and brought an action against his bankers for damages. He won his case, and, in the course of it, Lord Chief Justice Tenterden remarked: "I cannot forbear to observe that it is a discredit to a person, and therefore injurious in fact, to have payment refused of a draft for so small a sum, for it shows that the banker had very little confidence in the customer. It is an act particularly injurious to a person in trade."

The amount a banker will have to pay for dishonouring a customer's cheque when he ought to honour it depends chiefly on the view taken by the jury. If the customer can prove that he sustained any actual monetary loss, he is entitled to recover every halfpenny of that; and, in addition, he ought to have compensation for the blow to his credit and reputation. Such damage will always be greater in the case of a person in trade than a person not so engaged. There is a recorded case in which the customer gained a verdict for £500; and there was one not long ago in which the jury awarded £10 only. The case last mentioned was that of a turf commission agent, who had had more than one cheque dishonoured before. It was argued, therefore, on behalf of the bank, that the blow to this gentleman's credit could not do him very much harm, because he had not much credit to be hurt.

It is amusing to anyone who frequents the Courts to hear the arguments put forward on behalf of bankers who have dishonoured their customers' drafts. When the customer happens to be Mr. Micawber, whose financial reputation has suffered many blows, whose bills no man will look at, and whose dishonoured cheques have become a bye-word in the City, Mr. Kewsey, the learned counsel for the bank, will say: "Gentlemen, undoubtedly my clients ought to have honoured this cheque, and by not doing so they have rendered themselves liable to the plaintiff in damages. But when you are asked to award Mr. Micawber a substantial sum for the injury done to his credit, I ask you to pause and consider what his credit was like. You have heard that he was frequently in difficulties; that three times in the previous week his cheques had been returned for want of money to meet them; and that he had compounded with his creditors six months before. What great injury, then, can have accrued to this plaintiff because, by the purest accident in the world, one draft of his was not duly honoured?" And so on, according to the loquacity of the learned counsel, or the number of cases in other courts requiring his immediate attention.

But hearken to Mr. Kewsey when the plaintiffs happen to be Messrs. Munnibaggs & Co., the prosperous merchants, whose "paper" is reckoned almost as good as Bank of England notes, and who never before had a cheque returned over the counter. Rising in a deprecatory, not to say humble manner, the wily man of wig and gown, in his softest tone and silkiest style, thus delivers himself: "Gentlemen, it is true, unfortunately, that my clients have made a mistake, for which they are liable to pay compensation to the plaintiffs. It was, as you have heard, the merest slip on the part of a clerk, for which my clients have all along expressed regret, and now, through me, publicly apologise. But when you are asked, gentlemen, to award heavy damages in this case, I beg you



to ask yourselves the question, 'What injury have the plaintiffs sustained? Does any one suggest that the firm of Munnibaggs & Co., a firm of such standing and stability, has suffered or will suffer any appreciable damage by reason of this regrettable instance?' I suggest to you, gentlemen, that nominal damages will meet the justice of this case." This ingenious kind of address is called, in the profession, "reducing damages." If both these arguments are valid, it logically follows that the only man who can secure substantial damages is one of middling credit.

I have assumed, hitherto, that the customer had sufficient funds to his credit to pay the cheque when presented; but it may happen that a banker is liable for not honouring a draft even when the customer's balance is on the wrong side. The only cases I know of are (1) *Where the banker has specifically agreed to allow the customer to overdraw*. What is called "an overdraft" is where the customer is practically allowed to borrow from the bank, by the banker honouring his cheques when he has no funds of the customer's in hand. Overdrafts are common enough. I heard from an authentic source not long ago of a bank in the City which paid cheques to the amount of £100,000 in one day for a customer who was a stockbroker, though the latter had hardly £1,000 in the bank at the time. This occurred on a settling-day on the Stock Exchange. The broker had given cheques to the amount stated, and had received others to, perhaps, a greater amount; but his clerk had forgotten to pay in before the bank closed in the afternoon. A bank will generally allow a man to overdraw in whose stability they have any confidence. Sometimes a man goes to his banker and says, "I shall have some heavy payments to make on Friday. Will you let me overdraw for £500?" Now suppose the banker says, "Yes," and then forgets to tell his clerks about it; and so when the cheques for the extra £500 are presented they are returned unpaid. What is the position? Well, I think the customer has no case; because there was no consideration for the agreement to allow an overdraft. It was simply a friendly arrangement. But if the customer says, "If you will allow me to overdraw, I will deposit my shares in Cassell & Co., Limited, as security," and the banker agrees, and the shares are duly deposited, then there is a binding contract, and the banker must advance the money. Or even if the customer says, "I will pay 5 per cent. interest on the sum overdrawn," and the banker assents, there is a valid agreement; and should cheques be refused payment, the bank is liable to pay compensation for the injury to credit.

(2) *Where, by the course of dealing with the bank, the customer is led to believe that he may overdraw*, he has a legal right to do so. The great case on the subject occurred in 1860. Mr. Cumming was a merchant in Liverpool, and he kept his banking account at the Bank of Liverpool. In the course of his business, Mr. Cumming bought a cargo of rum from somebody in the West Indies, on the usual terms of payment on delivery—that is, Mr. Cumming had to pay £1,900 before the captain of the ship would hand over the rum. Not having the wherewithal in hand at the time, the merchant went to his bank, and asked them to let him overdraw £1,900, so that he could get his goods. The bank consented to do this, if they received a guarantee that they should

be paid out of the proceeds of the rum when sold. Accordingly, the bills of lading (the possession of which entitles one to the delivery of a cargo) were handed over to Messrs. Brancher & Co., brokers, with instructions to sell the rum. Messrs. Brancher & Co. gave the Bank of Liverpool a document, undertaking to pay the £1,900 out of the proceeds of the sale, and the bank at the same time paid the captain of the ship the sum specified. The rum was not sold at once, because prices ruled rather low at the time. While matters stood in this condition, Mr. Cumming paid £200 in to the credit of his account, and on the same day drew a cheque for £199 10s. When this cheque was presented, the manager of the bank refused to honour it; because, as he said, Cumming had no money in the bank to meet it. This statement was literally true; for the customer had borrowed £1,900, had then paid in £200, thus leaving him indebted to the bank in £1,700.

Transactions of the kind mentioned above are matters of daily, almost hourly, occurrence. I mean, for a merchant to borrow from his bank money to pay for goods, such money to be repaid out of the proceeds of the same goods. In fact, this is one of the means by which bankers make their profits; for they always charge the merchants something for the accommodation. Many a time had Cumming borrowed from the Bank of Liverpool upon the security of a cargo; and before this, the bank had always treated the loan as a separate transaction, not having anything to do with the current account. Imagine, therefore, the merchant's surprise when he found that this time they did not intend to wait for their £1,900 until the cargo of rum was sold, but to confiscate all their customer's ready cash to satisfy the debt. Cumming brought an action for damages because of the £199 10s. cheque having been dishonoured. He said, in effect, "Your agreement was to lend me £1,900 on the security of the cargo. When you made similar loans before, you allowed me to draw cheques for the money I had in your hands quite independent of the overdraft. You cannot now turn round and subject me to a different kind of treatment in this particular instance." The bank very naturally contested that line of argument. They maintained, "At the time you drew your cheque, you actually owed us money. As a matter of convenience to yourself we may have treated particular overdrafts as separate transactions on previous occasions; but that was a mere courtesy on our part, nor are we in any way bound to extend the same kindness to you this time. You might as well say that because a charitable stranger has given sixpence to a blind beggar for ten consecutive Saturdays, therefore he is legally bound to bestow sixpence on the eleventh Saturday." A jury gave their verdict for Cumming. The bank appealed, but the judges would have none of it. Five of their lordships unanimously endorsed the view taken by the lower tribunal. Baron Channell said that the loan of £1,900 was not like an advance to oblige the plaintiff—"a mere indulgence"—but a loan for which the bank had security; and as in previous dealings such loans had always been treated as separate transactions, the bank could not refuse to treat this one as separate. To justify them in their course of action, they ought to have warned Mr. Cumming of their intention before they lent the £1,900 to him.



**When a banker need not honour cheques.**—Just as the rule is that a banker must honour drafts of the customer so long as the customer has any money in the bank, so also the converse of the rule holds good—namely, that the banker is not bound to honour cheques when the money is exhausted. And as a banker may be liable to honour drafts though the customer has overdrawn his account (*see* Cumming's case above), so also he may refuse to pay cheques, sometimes, though he has sufficient funds in hand to meet them. This latter contingency very rarely arises. There was a case once in which a man named Hoffmann banked at the Agra and Masterman's Bank. Hoffmann received some bills due several months ahead, and as he wanted the money at once, he took them to his bank and there discounted them—that is, he indorsed them to the bank, and received cash. Readers of the sections of this chapter on Bills of Exchange will know that Hoffmann, as indorser, would be liable to the Agra Bank if those bills were not paid when due. At the same time, he would not be liable if they were duly met by the acceptor. The bills were for the sum of £8,648, and Hoffmann had about £4,100 to his credit at the bank. He drew several cheques, but the bank refused to honour them, on the ground that he might owe them a large sum on the bills; and, therefore, they were entitled to keep his balance by way of security. This view was decided to be correct.

Secondly, if a cheque is drawn in breach of trust, the banker will be justified in refusing to honour it. I have only heard of one such case, and that was where a Mr. Blank had two accounts at his bank—one private and the other comprising the money of a deceased person whose executor Blank was. Now, Blank overdrew his private account, so that he owed the banker a few pounds. Then Blank drew a cheque on his executor account, to have the money transferred to his private account, in order to make up the overdraft; or, in other words, he tried to repay the banker out of money that did not belong to him. When the banker refused to honour the cheque, and Blank brought an action against him, the House of Lords held that Blank was wrong and the banker was right. More than that, had the banker honoured the draft he might have rendered himself seriously liable, for it would have been taking money knowing that it did not belong to the giver.

A third case is that of *stale or overdue cheques*. You know that a cheque is stale or overdue, and consequently not negotiable, after it has been in circulation more than a reasonable time (*see* page 493). All the same, the holder of a stale cheque is entitled to present it at the bank and receive the money, provided there is nothing wrong. By "nothing wrong," I mean that the cheque has not been lost or stolen, that no indorsement has been forged, and that the holder is not merely a *bona fide* holder, but the true owner of the cheque. Now, if a banker pays a stale cheque, and it turns out that there was something wrong with it, the banker must bear the loss. On the other hand, if there is nothing wrong, the holder is entitled to the money. The law is that the banker can refuse to pay, straight down, a stale cheque, but can demand reasonable time to communicate with his customer, to see whether anything is wrong or not. This is what happens:—I give you a cheque drawn on the National and Provincial Bank, dated the 1st of April. You do not present it for payment until the 1st of May. The bank clerk says to you, "We cannot pay this; but if you will leave it with us

till to-morrow we will ascertain whether we are to pay it or not." Then they send a messenger to me, and ask if it is all right.

A fourth case of common occurrence, but doubtful authority, may be put this way:—Aggs has £49 19s. 11d. at his bank. He gives Baggs a cheque for £50. Baggs presents it, and the cheque is returned to him with the remark "insufficient funds" written upon it. In Scotland it is a decided law that the banker ought to have given Baggs the £49 19s. 11d., but in England it is a doubtful point. English (and Irish) bankers all say that they have the right to refuse to pay anything unless they have enough in hand to pay the full amount of the draft. The point has never, as far as I know, been fought, and the Bills of Exchange Act says nothing about it. For my part, I think the English (or Irish) bank would not be bound to pay.

**When a banker must refuse to honour a cheque** is (1) when he has notice of the death of the customer; (2) when he has notice of the customer's bankruptcy. There have been some interesting cases in connection with the first of these points. Mr. X. Entric, a rich old man, was very ill. It occurred to him that he had not provided in his will for Miss Farewon. So he sent for the lady at eleven o'clock one night, wrote out a cheque for £1,000 in her name, and handed it to her. But at twelve o'clock the same night the old gentleman died, and his relations who were in the house sent word to the bank at once. Consequently, when Miss Farewon appeared at the counter the next morning and asked for £1,000 in notes and gold, she was politely informed that the bank could not pay the cheque. The lady was in this position: Her cheque, as such, was waste paper, and she could not compel the executors to pay, because it was merely an intention to give; and a promise to give is of no value in English law, because it is without valuable consideration.

(3) When *the customer countermands* a cheque, the banker must not pay it. If he does, he will be obliged to refund the money to the customer. It makes not the slightest difference, as far as the banker is concerned, whether the customer had a good reason, a bad reason, or no reason at all for ordering the draft not to be honoured. Sufficient it is that it has been "stopped," or countermanded. If the holder of the cheque has any grievance by reason of the countermand, he must settle it with the customer.

(4) A banker must not pay a cheque if he knows—*knows*, mind; not *suspects*—that it is drawn for the purpose of committing a fraud. Thus, Fumme had two banking accounts at the same bank—one his own private account, which was overdrawn; the other was known to the bank to be a trust account. He drew a cheque on the trust account to repay the overdraft on his private account; in other words, paid a private debt with money known by the bank not to be his own. The bank was compelled to make restitution to the trust account.

Let me conclude the section on Cheques by this bit of advice: Never send away by post a cheque payable to bearer, unless you cross it and mark it "not negotiable" or "payee's account." Always use an "order" cheque-book. I always do, I can assure you.

**Bank-notes.**—A bank-note is neither more nor less than a promissory note payable to bearer on demand, and is subject to some of the same rules. There is



little difference, except with regard to the Stamp Laws, between a bank-note issued by a private bank (*i.e.* other than the Bank of England) and a promissory note given by Dick to Harry. Each of them passes by mere delivery from hand to hand; and the bank in the one case and Dick in the other is bound to pay the amount of the note to whomsoever presents it for payment. If payment is refused, the bank (or private person) takes the risk of an action, for the bearer can at once sue on the note, and the only defence will be that he (the bearer) acquired it unlawfully, or obtained it gratuitously from someone who did so acquire it, or else obtained it knowing that the person from whom he took it acquired it unlawfully.

Thus: Blinks is a tradesman. To him comes Jinks, and makes him a present of a £5 Bank of England note. Blinks neither knows nor cares how Jinks got the note. He takes it to the Bank of England to be changed into sovereigns, and is there informed that the note has been "stopped"—that is, it has been stolen, and the person from whom it was stolen has sent notice of the fact to the Bank, along with the number of the note. It turns out that Jinks was the thief. Blinks has no claim to the note or to the money represented by it, because he took it without consideration.

Again, suppose Blinks knows that the note has been stolen, and buys it cheap from Jinks—there are many persons who make a living out of dealing in stolen notes—Blinks cannot cash the note at the Bank, or, rather, the Bank may refuse to give coin for the note, because, though Blinks gave something for the note, he took it in bad faith—with notice (or knowledge) that it had been stolen.

But now take the ordinary case. Jinks, who has stolen the "five," enters Blinks's shop, buys and takes away a pound's worth of goods, and receives four sovereigns in change. Blinks has a perfect right to the £5 note, and the Bank of England, if it refuses to pay, can be sued for the £5. This was decided as long ago as 1758, in the case of *Miller against Race*. The facts, as stated in the report, were these:—William Finney, of London, owed money to Bernard Odenharty, whose place of business was at Chipping Norton, in Oxfordshire, and William, in order to pay his debt, made up a parcel of Bank of England notes, and sent them by post. The report continues, "That on the same Night the Mail was robbed, and the Bank-Note in Question (amongst other Notes) taken and carried away by the Robber." The note in question was one for £21 10s.—rather an odd sum for a bank-note—and the day after the robbery it came into the hands of Mr. Miller, who was an innkeeper, in the ordinary course of business, being taken over the counter as payment for goods. Mr. William Finney heard of the robbery on the 12th of December, posted off to the Bank with the numbers of the stolen notes, and asked them to "stop" the payment of every one of them. It was three or four months before Mr. Miller took the £21 10s. note to the Old Lady of Thread-needle Street and asked for specie in exchange. The clerk behind the counter was a gentleman of the name of Race, and he, finding the note marked "stopped" in the books, not only declined to pay the £21 10s., but refused to return the note to Mr. Miller. That gentleman at once took action against the clerk, demanding £21 10s., and he founded his claim on the allegation that he was the owner of the note. I need hardly say, perhaps, that he won. The judge, Chief Justice

Mansfield, laid it down that bank-notes, like cash change ownership by mere delivery—quite independently of how they were obtained originally. Lord Mansfield pointed out the inconvenience to trade if the law were held to be otherwise. “Here,” he said, “an innkeeper took it, *bonâ fide* in his business, from a person who made the appearance of a gentleman”; but he was careful to point out, “If there had been a Collusion with the Robber, or any circumstances of Unfair Dealing, the Case had been much otherwise.”

It may be interesting to know that although £1 notes are quite legal in Scotland, any banker issuing such a thing in England would be liable to be prosecuted and fined heavily.

It may also interest you to know that the banker has no right to ask you to write your name, or name and address on the back of one of his bank notes before cashing it. This is often done, especially at the Bank of England. But the demand is illegal; and you can, if you like, refuse to comply; and straightway sue the bank for the face value of the note.

#### IOU'S.

Many, if not most, people have either given or taken an IOU. My reason for mentioning it here is, not because an IOU is at all on the same footing as a Bill or Note, or any other negotiable instrument; but because most people imagine that an IOU is akin to a promissory note. This idea is another of the large crop of popular delusions on legal subjects.

It is somewhat curious that although IOU's are so largely in use, very few people know the simple fact that any departure from the very simplest form of the document in question is liable to turn it into something other than an IOU, and to alter its legal aspects altogether. First of all, I will give the proper form of IOU. It is merely this:—

To John Jones, Esq.                      March 12, 1897.

IOU Ten pounds.

£10.

HENRY F. BROWN.

No stamp is necessary. But if you write, as I have often seen, “IOU £10, which I will pay in three months,” or something of that kind, you require a stamp, because this is not a true IOU. For an IOU ought merely to be an acknowledgment that money is owing—not a promise or contract to pay money. An acknowledgment of indebtedness requires no stamp—a contract does. And, again, it is very easy to turn an intended IOU into a promissory note. You do not, and cannot, transfer the right to a debt by transferring an IOU for it. Thus in the above case, if John Jones sells the IOU to me, I do not thereby become entitled to demand the £10 from Henry F. Brown. And if an IOU is not transferable, still less is it negotiable as Bills and Notes are. An IOU loses its virtue (in England) in six years from the time it was given. And finally, it has not the same force in a court as a Bill or Note; for a Bill or Note is, in itself, by mercantile custom, a contract; and value is presumed to have been given for it, while your IOU has exactly the same legal value as, and no more than, a letter saying, “Dear Jones, I know that I owe you £10.”



## CHAPTER III.

### AGENTS.

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### SECTION I.

#### AGENTS AND AGENCY GENERALLY.

Definition of principal and agent—Who may be principals and agents—Two or more agents for the same thing—The contract and authority, difference between—How a man becomes your agent—Appointment—Holding out—How a man ceases to be your agent—Discharged agents—Notice to customers—"All money must be remitted direct to the firm"—When an authority cannot be revoked—Stock-brokers—Death of principal—Bankruptcy—Lunacy—The extent of an agent's authority—On what it depends—Difference between formal and informal appointment—Sub-agents—To whom responsible—An agent acting in his own name—When the unrevealed principal can be made liable—Dealing with an agent believing him to be principal—A principal who calls himself an agent—Liability of a man who says he is agent when he is not—An unformed company cannot have an agent—Agent's conduct binds the principal—Agent overstepping his authority—You can adopt anything done in your name, even if done without your leave—Up to what time you can adopt it—Duties of agent—Obedience—Diligence—To render accounts—To disclose everything—Secret commissions—Assuming an adverse position—Being paid by both sides—Using principal's money—Unpaid agents—Agent's rights—To be paid—Payment for introductions—A subject of frequent dispute—No payment for valueless services—Commission covers everything, as a rule—Indemnity—Lien—Right to retain principal's goods or money—How far it extends.

THE law of agents and agency is of great importance to the business man—perhaps more important than any other kind of law, except that relating to the sale of goods. One may say that almost every man engaged in business is either a principal or an agent—sometimes he is both. It is pleasing to be able to say that the law on this subject is fairly simple, resting as it does on well-defined logical principles that have slowly "broadened down from precedent to precedent" ever since courts of law took any notice of trade disputes, and is not complicated by Acts of Parliament.

**Definitions of Principal and Agent.**—An agent is a person who is employed to contract legal obligations and acquire legal rights for another, by

whom he is employed or instructed. The latter is called the principal. The great characteristic of agency is that as soon as the contract is made, or the act is done, the agent drops out of the transaction. He has no personal interest in it. Patrick instructs Andrew to buy for him (Patrick) an Alderney cow, two years old, taking care not to exceed such-and-such a price. Andrew goes to market, meets Carter, and buys from him a cow at the price of £5 for Patrick. As soon as the bargain is made, Andrew drops out of it. Carter must deliver the cow to Patrick, and Patrick must pay the price. Should there be any dispute as to the terms of sale, or as to whether the cow was what she was represented to be, Patrick and Carter must fight it out between them. Andrew, the agent, has nothing to do with it; his business was to make the contract on behalf of Patrick, and, that done, he disappears from the arena.

You can see that for Andrew to act as agent, there must be Patrick to instruct him so to act, and Carter, with whom he deals on behalf of Patrick.

**Who may be Principals, and who Agents.**—Anyone who can make contracts at all can make them through an agent—*i.e.* he can be a principal. Therefore, an infant can only be a principal to a limited extent, and so with lunatics, corporations, and alien enemies. But because an infant can only be a principal to a limited extent, it does not follow that he can only act as agent to a limited extent. In fact, a youth under full age is just as competent an agent, for all purposes, as a man of adult years.

**When you appoint more than one agent** you ought to be careful how you do it—I mean, more than one agent to look after pretty much the same affairs. These remarks especially apply to those agents who are generally called "attorneys," and who are usually appointed by "power of attorney." When Mr. Sindbad goes away to Australia, particularly for any length of time, he generally appoints someone at home to look after his affairs. Sometimes he appoints only one person, sometimes two or more, according as the affairs involve much or little work. We will suppose he appoints two—Mr. Tit and Mr. Tat. He appoints the two of them for one of two reasons—namely, either because he wishes one to keep an eye on the other, or because he wishes to divide the work. If he wishes Tit to keep an eye on Tat, and Tat on Tit, for neither to be able to act without the other, he will give them a "joint" power of attorney. If he wishes either of them to act alone, he will give a "joint and several" power. In the case of the joint power, he will always say "them" and "they." In a joint and several power he will say "them or either of them." It requires very little consideration to see that if Sindbad says, "I empower the said Tit and Tat to mortgage or sell my land if they shall think fit," it is vastly different from "I empower the said Tit and Tat, or either of them, to mortgage or sell my land if they or he shall think fit." If you ever have to emigrate or go abroad for so long that it becomes necessary to appoint an agent or agents, bear in mind what I have just written. In the first case, before the land could be sold or mortgaged, Tit and Tat must agree; and when sold or mortgaged the money must be paid to the two of them. In the second case, either of them could sell or mortgage, and his single receipt for the money would be good enough. So if you appoint three agents, and do not give each a separate power to act by himself, they must all agree before anything can be done.



If one stands out, the other two cannot outvote him and carry their point. They could, of course, in the case of a public body; but there is "a difference," says Lord Coke, "between authorities created by the party for private causes, and authorities created by law for the execution of justice." Another judge of old time said, "In matters of public concern the voice of the majority shall govern;" but it is not so in private affairs. And so, when you appoint your three agents, if you wish them to act by a majority, say so.

**The Contract of Agency and the Authority of the Agent.**—It is quite necessary to distinguish carefully between these two things. The contract of agency is a matter between the agent and his principal, and is subject to the ordinary rules as to contracts:—that is, there must be mutual agreement, without misrepresentation or mistake, fraud, or undue influence; legal consequences must be contemplated; and (in England) there must be valuable consideration. But the authority of the agent to bind his principal is quite another matter. For instance, you appoint me to collect your rents for a year, at a commission of 5 per cent. At the end of a quarter you send word to the tenants not to pay me; but without dismissing me. That is taking away my authority. I can do nothing, so long as you pay me the commission on all rents received by you. But if you, at the end of a quarter, dismiss me without notice, that is breaking the contract of agency; and I can at once sue you for damages—namely, what I should have earned in the year by way of commission. In other words, if you dismiss me wrongfully, you take away my authority and you break an agreement; if you merely take away my authority, you do not break our agreement—you simply pay me but excuse my doing the work. To take the other side of the question, if I, during the year, do not use my utmost diligence in collecting the rents, you can make me pay what you have lost. There is a curious old case in the Reports upon this. Mr. Webster, a West Indian merchant, shipped a cargo of slaves from Africa to his estates in the West Indies; and he directed a Mr. Detastit, his agent, to insure the human cargo against loss at sea. Detastit accepted the commission, but did not insure. Some loss having occurred, Webster came on Detastit; and the English Court decided that he could extract as compensation the same amount that the underwriters would have had to pay if the insurance had been effected.

Suppose, in the case I have mentioned, of your employing me to collect your rents for a year on commission, that you sell your property before the end of the year. Of course, I cannot then collect the rents. Can I make you pay me the commission I should have earned if you had not sold the property? In other words, is the fact of your selling the property a breach of the contract of agency? The answer is "No!" The point was decided in a big case that came from Liverpool some years ago. Messrs. Forwood & Co. were coal agents in Liverpool, and Mr. Rhodes was the owner of certain collieries. An agreement was made between the two firms to this effect:—

"Rhodes appoints Forwood & Co. his sole agents in Liverpool for the sale of coal from his collieries for seven years, at a commission of £3 per cent."

Before the end of seven years, Rhodes sold his collieries, and Forwood & Co. brought an action for damages. But they did not get any. The Court said, "We must try to find out what the parties meant by their agreement; applying the rule that they did not mean anything unreasonable unless they said it. If Messrs. Forwood & Co. are right, Mr. Rhodes was bound to keep his collieries going for seven years, whatever happened. That is, even supposing that he lost money on them the whole time, he was obliged to continue to work the pits in order to carry out the agreement with the agents. Again, however big a price he might be offered, he could not accept it for fear of breaking the agency agreement. And what of Forwood & Co.? They were not bound to send Rhodes one single order the whole time. The reasonable interpretation of the agreement is that the colliery owner was bound to accept orders from no one in Liverpool except Forwood & Co., and that they should receive £3 per cent. on all orders within the seven years; but there is no contract by Rhodes to work the collieries any longer than he likes."

I would have you observe that the agents in this case were to be paid only by commission. Had they been paid by salary, or partly by salary and partly by commission, they would have had a good case. As it was, they had no case at all; and their action was dismissed with costs. If you come to think of it, it would have been very absurd if Forwood & Co. had been able to stop Rhodes from selling his mines; though they, Forwood & Co., might not send in £20 worth of orders in a twelvemonth.

**How a man becomes your agent.**—As a general rule a man becomes your agent by agreement with him. This agreement generally takes the form of instructions or orders given by you and accepted by him. Nothing formal or "lawyery" is required, as you can soon see. Thus, you telegraph to a stockbroker, "Jay to Kay: Buy 100 Consols." The broker at once goes on the Stock Exchange, finds a jobber, and agrees to buy 100 Consols at the market price of the day. That contract, for better or worse, is yours; you must pay for the stock whatever price your broker has agreed to give, because your telegram made the broker your agent for the purchase of that stock. This is what is called an express or actual appointment of the broker as your agent. Your telegram has two effects—namely (1) It creates a contract between you and the broker, by which you employ him to do something for you, and promise (though you actually say nothing about it) to pay him the usual broker's commission, and to see that he suffers no loss on your account; (2) It gives the broker authority to make a contract with the jobber, which contract shall be as binding on you as if you had made it with your own lips or in your own handwriting. Express appointments of agents require little discussion. Whenever you tell a man to do this or that for you, you make him your agent to do this or that; and you must take the consequences of the deed, pleasant or otherwise. You may tell him by word of mouth, letter or telegram, or, in fact, in any way you like, with only one exception. The exception is easy enough to remember. It is this:—If I wish to appoint you to sign my name and [in England] seal my seal to a deed (*see* p. 284), I must appoint you by a



"deed." And as, in these days of rapid postal communication, one does not often wish to have a "deed" executed by deputy, it is not often necessary to appoint an agent by a "deed."

You can also make a man—and especially a woman—your agent without any appointment at all. This statement may seem a little startling at first sight, but if you turn to the chapter on husband and wife you will see what I mean. You will find that I explain (p. 19) how, if a wife orders goods in her husband's name from a tradesman, and the husband pays the bill, the same tradesman is justified in giving credit a second time to the wife, and can compel the husband to pay the second account, although the wife was never told to order the goods on either occasion. In legal language this is called "holding out" your wife as your agent. It is as good as saying to the tradesman, "My wife has my authority to pledge my credit." The same rule applies with equal force to anybody else not your wife. Suppose, for instance, your sister, or, for the matter of that, a woman who is no relation or connection, keeps house for you, and you pay for goods ordered in your name. You are, by that payment, "holding her out" as your agent; and she will be presumed to have your authority to order goods from the same person, although, in fact, she has no such authority.

So, also, you may let yourself in for very heavy liabilities in ways not domestic under this doctrine of "**holding out.**" A personal experience of my own may best indicate what I mean. A cheque once came to my chambers when I was away enjoying my vacation. This cheque was payable to my order, and was crossed. My clerk, acting on his own responsibility, wrote my name on the back of the cheque, and cashed it at a shop where I am in the habit of dealing. When I came home I ratified the signature, and treated it as having been done by my authority, for my clerk had done it without any dishonest intention, and used the money in my service. All the same, I interviewed the shopkeeper, and told him never to do it again, as no one had any authority to write my name on the back of a cheque. Suppose I had not taken the precaution of warning the shopkeeper, and my clerk had taken another cheque of mine, and written my name on the back and cashed it with the shopkeeper, and kept the money for himself, I should have had no redress. Why not? Because the tradesman would have been entitled to say: "I cashed one cheque indorsed in the same way before, and you said nothing about it. I believed, therefore, and was entitled to believe, that your clerk had your authority to indorse cheques in your name."

**How a man ceases to be your agent and loses his authority.**—I ask my readers to read this sub-section very carefully, bearing in mind what I have said before (p. 514) as to the difference between the contract of agency and the authority of an agent. If you have an agent, and you put an end to the contract by which you employed him, you take away his authority; and if he acts for you any more, he is doing a wrongful act, for which you can make him pay damages. But the people with whom he had dealings on your account may still treat him as your agent, unless and until you give them notice that he no longer acts for you. It makes no difference whatever that you have wrongfully dismissed him. I mean, it makes no difference between you and those people. It makes a very great deal

of difference between you and the agent, for if you dismiss him improperly you must compensate him for the wrong done. Let me take a case such as occurs pretty often. Turner & Co. have a commercial traveller named Parker, whose duty it is to call on retail grocers, solicit orders, and collect accounts. Parker's remuneration is £200 a year and expenses, and he is subject to dismissal at three months' notice. On the 1st of July, Turner & Co. write to Parker, "We have no longer any occasion for your services, and you may consider yourself dismissed as from to-day." Supposing Parker to have been guilty of no misconduct. He can begin an action at once for £50, being three months' salary in lieu of notice, for his dismissal was a breach of contract. But he must at once cease from soliciting orders in the name of Turner & Co., and must no longer collect accounts owing to them. Let us imagine that when the letter reaches Parker he is at Southampton on his rounds. Instead of promptly returning home, he calls on Mr. Spicer, a customer of Turner & Co.'s, from whom he takes an order for groceries, and receives £10 in settlement of an old account. As far as Parker is concerned, he has done wrong, and he might possibly find himself in prison for obtaining £10 under false pretences. But Spicer is all right. He did not know that Parker had been dismissed, and was therefore justified both in paying him the money and in giving him the order. Messrs. Turner & Co. will have to execute that order, or else pay damages for breach of contract, and the £10 will be considered a payment to Turner & Co., even if Parker puts it into his pocket and walks off with it. The reason is that Spicer did not know the authority of Parker was cancelled. Between Turner & Co. and their traveller all was at an end, but to all the world besides, Parker was still the representative of the old firm. From which it follows that the old firm will be bound by such dealings of his as he pretends to make on their behalf. It would be the wisest course for Turner & Co. to send a circular to the customers on Mr. Parker's round, to this effect:—

DEAR SIR,

We beg to inform you that Mr. Anastasius Aminadab Parker, who has hitherto represented us in the South of England, has left our employ.

Yours faithfully,

TURNER & Co.

If Spicer, after this notice, chooses to pay Turner & Co.'s account to Parker, so much the worse for Spicer.

The principle at the root of the law on this subject is the same as that at the root of the doctrine of "holding out." If you allow me to deal with Parker as your agent, and then dismiss him without telling me, I am not to be prejudiced by that omission.

**A warning** appears to be necessary to many men of business on one particular point which is for ever cropping up in practice. It is this: Many firms who send out travellers to solicit orders object to those travellers receiving accounts. Who that has been in business for any length of time has not seen the familiar warning printed at the top or bottom of invoices, accounts, and such-like documents, "Our representatives have no authority to receive money. Please remit to head office of the firm"?

In connection with this notice, two kinds of cases come before the courts of



law. Case number one is when the customer to whom Snook & Co. send such an invoice, nevertheless pays Snook & Co.'s commercial traveller the next time that gentleman calls for orders. The traveller does not remit the money to his employers, and presently disappears. At Christmas, that season when bliss and bills unite to inspire in the householder a streaky kind of happiness, comes a bill from Snook & Co., with a footnote, to wit: "A prompt settlement is requested," accompanied by a note wishing the customer all the compliments of the season. The customer replies by return of post, enclosing his receipt signed by the late traveller. In return comes a letter pointing out that on the invoice sent with the goods was a printed notice, warning customers against paying Snook & Co.'s travellers; and "we regret," it continues, "that we cannot admit the validity of the receipt, and we must press for payment." In these circumstances, I strongly advise the customer to pay up, and smile—if he can. For he knew quite well, or ought to have known, had he not wilfully shut his eyes, that a commercial traveller had no more authority to receive Snook & Co.'s money than the man in the street had.

The second case is a very different one. Snook & Co. imprint upon their invoice the warning notice when they send goods to their esteemed customer Mr. Doox. Nevertheless, when Snook's traveller calls on the next occasion, the worthy Doox pays what he owes and takes a receipt from the traveller, at the same time giving another order. The second lot of goods is duly forwarded, accompanied by an invoice bearing the old familiar caution, and a letter in which Snook & Co. express thanks for the prompt settlement of the last account. Again the traveller calls, again Doox pays him, and again gives another order. Imagine the surprise of the incautious Doox on receiving, along with the invoice for the third lot of goods, an account not only for them, but also for the second lot! He at once sits down and writes a letter in explanation, enclosing the traveller's receipt for the second lot. Messrs. Snook & Co. reply, regretting that they cannot recognise that receipt, at the same time pointing out the warning on the invoice, and winding up with a request for a prompt settlement. Doox betakes himself to his man of law, and on his advice sends off the amount on the third account with a letter refusing to pay the second over again. Now let Snook & Co. do their worst; for should they put Doox in court to compel him to pay the second account, they would fail. Words of wisdom will probably fall from the Bench somewhat in this wise: "True enough it is that you, Snook & Co., did by your words tell Mr. Doox that your agent had no authority to receive money. Yet, when Doox paid him the first account, you allowed the payment without remonstrance. So that by your act you contradicted your words. Even if you received the money from your traveller on the first occasion, you should have written to Mr. Doox requesting him to observe the rule for the future, and telling him that, although you would overlook it this time, you would not in future recognise a payment made to your traveller. By your own act you have destroyed the effect of the printed notice. Verdict and judgment for the defendant, with costs."

This is no picture of imagination. It is a drawing from life. And the moral of it is obvious.

To return to the immediate proposition at the head of this sub-section, and to summarise the points made: (1) An agent ceases to be your agent when the contract between you is put an end to by either of you—whether rightfully or wrongfully. (2) An agent loses his real authority (*a*) when the contract to employ him as agent is put an end to, (*b*) when you tell him not to act as your agent—or, as lawyers say, you revoke [Latin, *re*=back again, *voco*=I call] his authority. You can revoke your agent's authority at any time you like, for any reason or no reason—except, of course, that you must not revoke it so as to damage your agent; and it is of no use saying, "I take away your authority," after the thing for which you appointed him agent has been done.

Let me first examine the statement that *a principal must not revoke his agent's authority so as to injure the agent*. Pray be careful not to interpret this saying too widely, or you will altogether misunderstand it. It has a very limited application. Suppose I ask you, a house agent, to purchase for me a certain house. You go to the owner of the place and agree on my behalf to purchase it for £1,000—£100 to be paid next day in cash, and the balance when the deeds are signed and sealed. Then you come to me and tell me of the bargain you have made, I express myself highly satisfied, and give you the £100 to pay to the seller of the property. But before you have paid it, I send a message to you telling you not to part with a penny of the money. Suppose you part with the £100 after receiving this message, you will have to pay me the whole of it back, because you had no business to pay after I had revoked your authority to pay. But you may ask, "Would not such an action on your part injure me in my business of a house agent? Would not the seller of that property refuse to deal with me in the future; and would not such proceedings injure my business reputation?" It may be so; but, all the same, you have no remedy.

The only time you would be justified in doing an act, although your principal had told you not to do it, would be when, either by the usage of a trade or the custom of a market, you were liable yourself to the customer. For instance, Mr. Lator instructs his broker, Shairs, to buy 1,000 Bottomless Pit Mine shares on the Stock Exchange. Shairs obeys the instructions by walking into that part of the Stock Exchange known as the Kaffir Circus, and saying to a jobber, by name Cellanbye, "1,000 Bottomless." Mr. Cellanbye makes a little jotting in a little book, and the bargain is struck. Lator has bought from Cellanbye, through the medium of Shairs, 1,000 shares in the Bottomless Pit Mine. You may be aware that there are certain days kept and observed on the Stock Exchange called Settling Days, upon which festive occasions everybody pays everybody else (as a lady might say) what everybody owes everybody. Before Settling Day, Lator writes or telegraphs to Shairs, "I refuse to take thousand Bottomless Pits from Cellanbye; do not buy." In the case of an ordinary agency this would be enough. Shairs would refuse to pay Cellanbye, and would leave him to fight out with Lator the question of damages for breach of contract. But in the case under consideration, the telegram is not enough; for even after he receives it, Shairs is quite at liberty to go on with the transaction as though there had been no attempt to withdraw



his authority. Let me tell you why. Cellanbye and Shairs are both members of the Stock Exchange; and, according to the rules of that powerful body, if a broker makes a bargain on the Exchange, he is bound to carry it out himself. If he fails to do so he is turned out of the Stock Exchange. So that Shairs, having agreed to buy from Cellanbye, is compelled to pay the price out of his own pocket if need be. Seeing that Shairs only agreed to buy 1,000 Bottomless Pits because Lator ordered him to do so, it is only fair and right that Lator should compensate Shairs.

Understand, please, that it is only because Shairs would be compelled by law personally to fulfil the contract made by him as agent that his authority cannot be withdrawn when he has once begun to execute the order. He has taken upon himself a personal risk, and the man at whose request he undertook it must see him through. This rule not only applies to brokers on the Stock Exchange, but also to brokers on every market according to the rules of which the broker is personally liable to fulfil all the contracts that he makes. But the principal may ask, "What have I to do with the rules of a market to which I do not belong?" The answer is: "When you employ a man who is a member of a market to do something on that market on your behalf, you are bound by the rules of that market, although you do not know what they are"—just as a man who enters a train without a ticket and travels from Glasgow to Edinburgh is bound to pay the fare, though he did not know how much it was when he started. He could easily have found out by inquiring.

Let me reiterate—when you employ an agent who can only carry out your orders by incurring a personal risk, it is not in your power to take away his authority after he has incurred that risk.

**The death of the principal** cancels the authority of the agent. This is one of the most curious parts of the law of agency, for it is the death itself which puts an end to the agent's power to act—not the knowledge that the principal is dead. In other words, if you are my agent, with authority to make certain kinds of contracts on my behalf, and I die on Friday, and you make a contract in my name on Saturday without knowing that I am dead, the contract is of no effect. You are not personally liable to fulfil it, because you made it in good faith, believing that you had my authority. It goes without saying that I cannot fulfil it. My executors are not liable to fulfil it, because they never authorised you to act; and the mere fact of my death put an end to your authority.

**Bankruptcy of the principal** also puts a summary stop to the agent's authority. But bankruptcy differs from death in its effect, for in this case the agent is at liberty to go on until he knows of the principal's insolvency. Thus, if you are my agent to sell goods on my account, and I am declared bankrupt on Friday, and you did not hear of it until Monday, the contracts of sale made by you on Saturday are binding, and my trustee in bankruptcy may claim the benefit of them on behalf of my creditors.

There is one kind of contract not affected by bankruptcy—namely, a contract for purely personal services to be rendered by the principal. Such contracts as these are no concern of the creditors, and the bankrupt is quite at liberty to go on making them, either himself or through an agent. For instance, we all know,

I suppose, that actors and singers, male and female, music-hall performers, and all such as call themselves "artistes," do not, as a rule, make their own engagements with theatrical and music-hall managers. When Mr. Muldooney discovers that he has a voice, and is wishful to turn it to account, he puts it into the hands of Doneville & Co., the musical and dramatic agents. Doneville & Co. put him down on their list as Signor Dulmoni, and offer his services to concert or operatic impresarios. Whatever engagements are made for the new tenor must be made with Messrs. Doneville as his representatives, and they try to obtain good pay for him, for the simple reason that they are paid a commission on what he earns by these engagements. Now, suppose Signor Dulmoni lives beyond his income, or unforeseen misfortune overtakes him, so that he awakes one morning to find himself a beggar—debts, £5,000; assets, £500. An unfeeling creditor takes action, and ultimately the gifted singer finds himself declared a bankrupt. To Messrs. Doneville & Co. this little mishap makes not the slightest difference. They can continue to accept engagements on their client's behalf, and he will be bound to fulfil those engagements, and be entitled personally to the remuneration. Remember, however, that this exceptional mode of treatment is strictly confined to contracts where the bankrupt principal has to do something personally, and to do or give nothing else except his personal services.

**Lunacy** is another thing to be taken into account. When the principal becomes a lunatic, any agreements entered into with him are not binding on him if the other party to the contract knew the state of his mind. Now, if an agent makes a bargain after he knows that his principal is "out of his mind," so much the worse for the agent. He will have to pay the piper; but the insane principal is liable so long as the other party knew nothing of the state of affairs. Mr. Runn was a happy married man, who gave his wife authority to purchase on his credit household goods and domestic necessities. After some years of married life Mr. Runn's reason left him, but Mrs. Runn did not allow the matter to alter her dealings with the tradespeople. She continued to order draperies and groceries as usual. She herself had no means, and could not pay anybody a penny; but the tradesmen were obliging, and Mr. Runn's credit was good. Not long was that gentleman out of his mind, and when he came to himself I imagine he must have wished, as Douglas Jerrold once said, that "he had come to someone else"; for a vast array of bills rose up before him. Mrs. Runn, by using the utmost diligence, had contrived to pledge her husband's credit to an alarming extent. One account was owing to Mr. Drew, and him Runn refused to pay. Drew brought Runn into court, and for the defence it was contended that when Mr. Runn went out of his mind, Mrs. Runn's authority as his agent ceased, and therefore the contract was one made on Runn's behalf without his authority. But Drew swore that he did not know Runn to be insane at the time he supplied the goods, and, as the jury believed his statement, judgment went in favour of the tradesman.

**The scope and extent of an agent's authority** will depend on several considerations. When an agent wishes to know how far he may go in acting for his principal, he should consider, *first*, whether he is appointed by any written document; and, *second*, if so, what sort of a document it is. For if an agent is appointed in writing, it is best for him to stick to the plain words of the



document, especially if that document be a formal one. As I have elsewhere stated (p. 513), it is customary for a man who leaves England for any length of time to give someone power to transact business on his behalf, and this power is almost always contained in a written document. An agent who acts under such a power is called, in England, "an attorney"; in Scotland the lawyers speak of him as a "factor and commissioner." The paper by which the attorney (or factor and commissioner) is appointed is almost invariably of a formal character, drawn up by a lawyer. For this reason it is very strictly construed, nor is the agent allowed to depart from its terms by one word. Nay, even words of a vague and general character are narrowed in their meaning. There are many cases in point. Mr. Jenkins, being about to set out for Australia on a tour, signed and sealed a deed called a power of attorney, appointing Mr. James his agent. It is customary for these deeds to state the purposes for which the agent is appointed, and to enumerate the things that he has authority to do. For instance, this is a common specimen (after the formal parts of the document): "I hereby appoint John James my attorney to do all acts and deeds necessary or advisable for the carrying on of my business of a draper, and for such purpose to draw, indorse and accept bills, notes and cheques in my name," and so on.

In the document to which I am referring, the words were: "To receive all money that may be due to me, and to transact all business on my behalf." Mr. Jenkins sailed away, and Mr. James began to collect the money due to him. One of Jenkins's debtors offered to give a bill of exchange for his debt, and James, thinking this the best way of getting the money, took the bill, and at once discounted it to Jakes, a financier. The bill was payable to Jenkins on order, and in order to pass it to Jakes, James had to indorse Jenkins's name on the back. When the bill was presented for payment it was dishonoured, wherefore Jakes at once brought an action against Jenkins as indorser (*see* p. 457). Jakes would be bound to win if James had authority to indorse bills on Jenkins's behalf; but Jenkins denied that he had any such authority. "I appointed James my agent," said he, "only to collect my debts. I gave him no power to put my name to bills of exchange." "But," replied Jakes, "James showed me a power of attorney from you authorising him not only to receive moneys, but also to transact all business for you while you were away." The judges who tried the case decided in favour of Jenkins, on the ground that the general phrase "transact all business" must be taken to refer to the well-defined words, "To receive all moneys due to me." It really meant, their lordships decided, that James was to have power to transact all the business necessary to enable him to receive money due to Jenkins. That is to say, he might give receipts for payments, and sign Jenkins's name to them. He might instruct a solicitor to bring actions against persons who would not pay, but he had no power to make Jenkins liable upon a bill of exchange, since that was not a piece of business necessary to enable him to collect debts.

There is another case which shows how careful one ought to be in dealing with a man who acts under a power of attorney. A Mr. Danby was about to leave England for a year, and so he appointed Messrs. Parker to act as his agents while he was away. The power of attorney gave the agents the very widest possible powers. They were to have the right to collect and receive money, to sell or

mortgage property, and to draw cheques on Mr. Danby's account at Coutts's to an unlimited extent. In the first part of the power of attorney the solicitors who drew it put the following clause: "Whereas the said Danby is about to return to South Australia." Then they went on to say that the agents were to have the powers that I have mentioned a few lines above. I want you to observe the fact that the power did not say that the agents should only have the right to act during Mr. Danby's absence; it did not limit the time specifically: it only said that Mr. Danby intended to go to South Australia. During the time Mr. Danby was on his travels, his agents managed all his affairs at home. They received rents and other debts, drew cheques in Mr. Danby's name, which were cashed at Coutts's Bank after the agents had shown their power of attorney. At the end of twelve months Mr. Danby returned, but he did not notify Coutts & Co. of his arrival. About three weeks afterwards the agents mortgaged a life insurance policy in Mr. Danby's name to Coutts's, and drew the cash, amounting to £10,000, which the agents put in their pocket and used as a private emigration fund. The happy country to which they emigrated was the Argentine Republic, at that time the safe haven of rest for fraudulent trustees, absconding bankrupts, and rogues of every description.

When Mr. Danby inquired at Coutts's as to the condition of his account, he found to his dismay that his trusted agents had robbed him. Said he to Messrs. Coutts & Co., "You ought not to have advanced that last £10,000. You had seen the power of attorney, in which it was stated that I was going abroad to South Australia; and it must have been evident to anybody that I intended Parkers to act for me only so long as I was away. When a reasonable time had lapsed you ought not to have honoured cheques signed by them without first making inquiries as to whether I had returned or no." The bankers made answer, "True it is we saw the power of attorney, but you do not in any place state that you appoint Parkers your agents during your absence only. Therefore we were entitled to consider them as your representatives until we heard from you cancelling their authority."

Neither side showed a disposition to give way; and no wonder, for neither of them cared about losing £10,000. The result was that her Majesty's judges were called upon to decide between them. The decision of their lordships was in favour of Mr. Danby; and although, no doubt, the judgment was quite proper, one cannot help sympathising with Coutts & Co. It was one of those hard cases in which a loss was bound to fall on one of two really innocent parties—a kind of case that often comes before the Courts. The moral is, that when anyone comes to you representing himself as an agent acting under power of attorney, you should ask to see the power, and read it very carefully. Do not deal with the agent beyond the strictest limits of that power; and give to every expression its narrowest construction. These rules apply in all cases where an agent or factor is appointed in writing, if that writing is a formal document drawn up by a lawyer.

When an agent is appointed by a writing of an informal character the same rules do not apply. For instance, if the writing is a letter or a telegram, you are entitled to read it upon a liberal basis, and to give the words the widest, not the narrowest, meaning. The same holds good of authority given by word of mouth.



An agent always has authority to do such things as are customary and usual in the ordinary course of business. These customs and usages chiefly arise in the case of agents of a well-defined class—for instance, brokers, auctioneers, mercantile agents, commercial travellers, and the like. The reason is that everyone who instructs (say) an auctioneer to act for him is supposed to know in what way auctioneers conduct their business; and, unless he says anything to the contrary, is supposed to authorise the auctioneer to do the business in the customary way.

In subsequent sections I shall show you what are the chief usages of commercial travellers, brokers, mercantile agents or factors, auctioneers, and agents for foreigners. One of the questions continually arising in the Courts is—

**Can an agent appoint a sub-agent?** In other words, if you appoint me as your agent to do something for you, can I pass on the whole or part of the work to Jones. The answer is, as a rule, “No!” but the “No” is so qualified that in ordinary commercial life it is almost like a lady’s “No.” I have heard it said by a cynic that when you ask a lady a certain momentous question and she replies “No” emphatically, you should proceed to ask her whether she prefers pearls or diamonds for the engagement ring. As a rule, if you are Jones’s agent to do a particular thing, you must do the work yourself—you have no right to employ Smith to do it for you. The reason is plain. When Jones employs you as his agent he does so not simply because he wants someone to do the work, but because he wants *you* to do it. Presumably he employs you because he has confidence in your knowledge of that kind of business and in your integrity, skill, and diligence. If he had wished Smith to transact the business for him he would have employed Smith directly.

Having stated the rule, now let me come to the somewhat large classes of exceptions. An agent may always appoint a sub-agent (1) when the principal has told him that he may do so; (2) when it is usual in the ordinary course of business; and (3) when it is necessary. As to (1), the case is very simple. If I send a cargo of indigo to Glasgow to a broker there, with instructions to sell it, I shall very likely say, “If you cannot find a purchaser in Glasgow, send it to Dundee.” This is plainly an authority to the Glasgow agent to send the indigo to his agent in Dundee if he thinks fit. Now for (2). There are very many cases in which it is customary for an agent to appoint a sub-agent. If you give £300 into the hands of your solicitor and ask him to invest it for you in East India Stock, he will not do the work himself, but will employ a stockbroker to make the investment. The solicitor is your agent; the stockbroker is his agent and your sub-agent. Again, if you consign goods to an agent in Germany, with instructions to sell them to retail shopkeepers, he will be quite justified in sending round his travellers to solicit orders for those goods. If he is a merchant it would be unusual for him to go round with the goods himself.

There are a great many cases in which it is both usual and necessary (3) for an agent to act through a sub-agent. For instance, if you emigrate to America, leaving me your agent (factor and commissioner) under a power of attorney to wind up your affairs, I may be compelled to act by means of other

agents whom I appoint. Suppose you leave a house full of furniture. In order to turn this into money I shall probably have to appoint an auctioneer to sell it by auction. Various people owe you money. Such of them as will not pay must be sued for the debts; and for the purpose of bringing the actions I must employ a solicitor or writer. Of course, I could bring the action in person without legal assistance; but this would be unwise and unusual. The point is, that to do the kind of business generally transacted by particular kinds of agents, I am justified in employing such agents—a solicitor to take legal proceedings, an estate agent (*Scotica*, factor) to let a house, an auctioneer to sell the property by auction—but such business as an ordinary man would be well able to do himself I must do.

**To whom is the sub-agent responsible?** Whenever the agent has power to appoint a sub-agent, the latter must account to the principal for his actions. There was a great case on this some years ago, when the question was fully discussed. A firm called De Bussche & Co., of London, had a ship to sell. They sent it to an agent in China, with instructions to get the best price for it, but not to accept less than \$90,000. The agent was unable to dispose of the ship in China, so he sent it to an agent of his own in Japan upon the same terms upon which he had received it—namely, with instructions to sell it for not less than \$90,000. The Chinese agent did not tell the Japanese, whose name was Alt, that he (the Chinaman) was only an agent. The Japanese gentleman, that is, thought he was acting as agent for the gentleman in China; he had no idea that he was the sub-agent of De Bussche & Co. Alt could not find a purchaser for the ship for some time; but he had some idea of being able to get a good price for her before very long, so he bought her himself at the minimum fixed price, \$90,000. Not long afterwards he re-sold her to a Japanese prince for \$160,000—a very fair profit. By some means or other De Bussche & Co. heard of this, and they promptly brought an action to compel Alt to disgorge the profit he had made. Alt's defence was, "I have nothing to do with you. I was the agent for the man in China. To him I looked for my commission on the sale; and to him alone I am responsible for my acts. If you think you are entitled to anything, take action against your Chinese agent; for you have a contract with him but none with me." But the Court of Appeal would have none of it. Their lordships held that when a sub-agent was properly appointed he became directly responsible to the real principal in the business for the proper performance of the duties of an agent; and as an agent has no business to make a profit out of the transaction (except his commission), Mr. Alt was compelled to pay to De Bussche & Co. the profit he had made on the re-sale of the ship. "Rather rough on Alt!" I think I hear some reader exclaim. Not at all. Alt had no business to do what he did, whether he was acting for De Bussche & Co. or for the man in China. If the Artful Dodger steals a watch from the pocket of Mr. Pecksniff, what does it matter to him whether the time-piece belonged to Pecksniff or to Martin Chuzzlewit? Had the Artful One kept his hands in his own pockets, the ownership of the watch need not have troubled him.

**An agent who acts in his own name, and not in the name of his**



principal, is a common object in the law courts. This is the sort of thing I mean:—O'Smith, of Dublin, writes to MacBrown, of Liverpool, "Buy me 1,000 tons of soap at market rates." MacBrown betakes himself to the Alabaster Nondissolving Soap Company and orders 1,000 tons of their best, the price being £150. He can do one of four things when he gives the order—namely, say plainly, "I am buying this as O'Smith's agent," or say, "I am not buying this for myself, but as agent"—not saying whose agent; or, again, say nothing at all about it; or, lastly, say, "I want this for myself." To put this in legal form, he can (1) disclose the fact of agency and the name of his principal; (2) disclose the fact of agency, but not the name of the principal; (3) not disclose the agency at all; or (4) represent himself to be the principal. All these four sets of facts are of the commonest occurrence, and, as they are important to the business man, I will discuss them in order.

(1) When MacBrown says, "I am acting for O'Smith," the case is simple. As soon as the contract of sale is made, MacBrown drops out of it; O'Smith and the Soap Company are left face to face. The Soap Company must get their money from O'Smith. Not one penny can they claim from MacBrown. On the other hand, if the soap is delivered late, or is of bad quality, etc., nobody but O'Smith can complain. Suppose MacBrown were to bring an action in his own name because the soap was inferior to that ordered, he would inevitably lose, for the Soap Company would say at once, "We did not sell to you, but to O'Smith. You were only a messenger—a telephone wire used by O'Smith and ourselves to talk through, and you can no more sue us than the wire could."

(2) When MacBrown says, "I am buying for someone else," without saying for whom, the case is not so simple. It is unreasonable to suppose the Soap Company would part with their goods on the credit of nobody knows who. In the first place, then, the agent is personally liable to pay for the goods. If he never discloses who his principals are, he remains liable; but if he afterwards goes to the Soap Company and tells them for whom he bought the goods, the Soap Company can then either charge O'Smith or stick to MacBrown. To turn to the other side of the question, O'Smith can come forward at any time and disclose himself, and take all the benefit of the contract. This is perfectly reasonable, because the Soap Company knew when they made the bargain that the person who was to have the benefit of the contract was not MacBrown but someone else. There is an old case of a man named McKune, who called himself a "general Scotch agent," and carried on business at Liverpool. He had some customers at Dumfries named Thomson & Co., who wrote to him to send them a lot of earthenware and glass. McKune went to the warehouse of Davenport & Co., in Liverpool, saw the head of the firm, and ordered the goods, saying that they were for some clients in Scotland. Mr. Davenport did not ask the clients' name, nor did McKune mention it, and the goods were entered in Davenport & Co.'s books in McKune's name. Soon afterwards the general Scotch agent became bankrupt. Davenports then took the trouble to inquire the name of the Scottish clients, for there was precious little chance of their squeezing anything out of McKune. Having ascertained the whereabouts of Thomson & Co., the demand was made on them for the money—about £200. Thomson & Co. declined to pay, where-

upon the Liverpool firm started an action. On the one side it was said, "You [Thomson & Co.] are our real debtors. You bought the goods from us, though, it is true, you bought them through an agent." In reply, Thomson & Co. urged: "How can you say that you gave credit to us? You had no idea who the 'Scotch clients' of McKune were. McKune is the man on whom you relied, proof positive of which is the fact that you debited him in your ledger." "Certainly we debited him in our books," was the answer; "how could we do otherwise when we did not know your name? But we did this only as a means of identifying the account. But we did not supply the goods simply on his credit. We held ourselves responsible to you for the safe delivery of the crockery, and we expected to be paid by you, whoever you might turn out to be." Verdict went in Davenport & Co.'s favour.

(3) The case becomes very complicated when MacBrown simply orders the goods, and does not say a word about agency. Understand, he does not say, "I am an agent"; neither does he say, "I am principal." The question then is, "Did the Soap Company believe they were dealing with MacBrown personally, or did they think he was acting as agent, or did they just think nothing at all about it?" If they thought he was buying for himself, they can insist on making him personally responsible. If they had an idea that he was buying for someone else, then they are bound to consider the contract as one between themselves and O'Smith, if O'Smith chooses to reveal his identity. If they never thought about it one way or the other, again they are bound to recognise O'Smith.

Cases under this heading generally arise when, owing to previous dealings with the agent, an attempt is made to set one account against another in the following way:—In the year 1795 Messrs. Baggs and Baggages carried on business in the wool trade, partly on their own account, partly as agents for other people. They owed about £1,200 to a firm called Claggett & Co., and Claggetts, not seeing any prospect of getting paid in money, thought they would take it out in goods. So they sent an order to Baggs and Baggages for a large amount of woollen cloths—some £2,000 worth. The order was duly executed. Baggs and Baggages took the cloth out of a large heap in their warehouse, and sent it by carrier, at the same time forwarding a bill of parcels. Then appeared on the scene a Mr. George, of Frome, in Somersetshire—an old centre of the West of England cloth trade. Said Mr. George: "Nearly all that cloth was mine. Baggs and Baggages were my agents, to whom I had entrusted the cloth for sale, and I shall be pleased if you will remit the money direct to me." "Thank you kindly," Claggett & Co. replied. "We shall be very glad to remit the £2,000 after deducting £1,200 owing to us by Baggs and Baggages." "You cannot deduct my agents' debt from money due to me," answered Mr. George; and so the debate continued, until at last they found themselves in court. Claggett & Co.'s lawyer argued thus for his side:—"My clients, when they bought the cloth from Baggs and Baggages, thought they were buying Baggs and Baggages' own stuff. They had no idea the firm were selling merely as agents, and they were never told anything about it; even the bill of parcels was made out as though Baggs & Co. were principals in the transaction. It ran, 'Messrs. Claggett & Co., bought of Baggs and Baggages,' and that was all. Had my clients been told that the cloth was Mr. George's they would



not have bought so much of it, if any, because they relied on being able to deduct the £1,200 debt from the price."

Mr. George's counsel put it like this:—"There is no doubt that Baggs and Baggages were my client's agents in selling these goods. True, they did not say so to Claggett & Co., but what of that? Claggett & Co. knew perfectly well that Baggs and Baggages carried on business as agents as well as on their own account, and they [Baggs & Co.], although they never said they were agents in this business, yet never said they were principals. If Claggett & Co. chose to assume that they were dealing with principals, and not with agents, it is their mistake, and they must take the consequences."

Then the judge had a word to say: "I find," said his lordship, "that Claggett & Co. honestly believed that Baggs and Baggages were selling the cloth on their own account. But for this honest belief they would not have bought the cloth at all. It may be that Baggs & Co. exceeded their authority in selling the stuffs in their own name, but that is a matter between them and Mr. George. Where goods are placed in the hands of an agent for sale, and are sold by him in circumstances which are calculated to induce, and do induce, a purchaser to believe he is dealing with his own goods, the principal is not permitted afterwards to turn round and tell the buyer that the character he himself has allowed the agent to assume did not really belong to him." So that Claggett & Co. had to pay Mr. George only £800, being the £2,000 less the £1,200 debt due by Baggs and Baggages.

Let me emphasise the moral of this case: If an agent sells goods without stating that he is an agent, and so the buyer *believes* him to be principal, the buyer can deduct from the price of the goods any debt or claim that he has against the agent. See how I have italicised the word "*believes*." Let the case of *Cooke versus Eshelby* tell the reason.

Isaac Cooke & Sons were cotton merchants in Liverpool, and members of the Liverpool Cotton Association. There was a firm called Livesey, Son & Co., members of the same Association, who carried on the dual business of brokers and merchants in cotton—that is to say, they dealt in cotton, sometimes on their own account, sometimes as agents for other people. On two separate days in 1893 Livesey & Co. sold to Cooke & Sons two parcels of cotton, to be delivered on a future day. Liveseys made the contracts in their own name, but in reality they were acting as brokers for a merchant named Maximos. Cooke & Sons failed to take delivery of the cotton, which had fallen in price, and so became liable to pay £680 by way of "differences" (see p. 297). Maximos having failed in business, a Mr. Eshelby was appointed trustee in bankruptcy, and he proceeded to demand the £680 from Cooke & Sons. Now, Livesey & Co., the brokers, owed Cooke & Sons a sum of money (say £400), and this amount Cooke & Sons claimed to deduct, on the ground that they had dealt with Livesey & Co. as principals, and had not been informed that they were selling as agents for Maximos. At the trial a question was put to one of the firm of Cooke & Sons: "Did you believe that Livesey & Co. were acting as principals or as agents in selling the cotton?" The answer was curious: "I had no belief one way or the other."

"But," pursued the cross-examining counsel (afterwards a County Court

Judge), "did you not know that Livesey & Co. carried on the business of brokers?"

"Yes, I knew that."

"Then, did you know it to be quite likely that in this matter they were acting as brokers?"

"Yes, I knew that."

Upon this evidence a verdict was given against Isaac Cooke & Sons, because they, knowing it to be just as likely for Livesey & Co. to be brokers as for them to be selling on their own account, had made no inquiries. They were not in the same position as Claggett & Co. in the last case (p. 527). Claggett & Co. bought from Baggs & Co., believing that the latter were selling for themselves. Cooke & Sons bought from Livesey & Co., knowing that they might be agents, and not believing them to be selling on their own account. Therefore Claggett & Co. were allowed to deduct from the price of the goods the amount owing to them by the agent. Cooke & Sons were not so allowed. What is the moral of these cases? Surely it is this: When anyone whom you know to be a broker or mercantile agent as well as a merchant wishes to make a contract, ask him, "Is this for yourself, or do you act for some client?" If he replies, "For myself," then you know where you are, for even if he is not telling the truth it is all the same to you. Suppose he turns out to have been acting as agent for O'Smith, you are in no way prejudiced. You are entitled to treat the contract as a personal (not an agency) one, and O'Smith is not allowed to contradict his agent's statement.

I wish to make perfectly clear one point. The unknown principal, O'Smith, can at any moment step from behind the curtain and say, "This contract was made on my behalf. MacBrown, from whom you bought the goods, was really my agent. Be kind enough to pay me directly." Then you will be forced to pay him directly, but with one proviso—if you did not know that MacBrown was a mere agent, *and* if you believed him to be selling on his own account, you may deduct from the price any *contra* account you may have against MacBrown. For you have been misled. The person who misled you was O'Smith's agent. And O'Smith cannot adopt the benefit of his agent's conduct, and drop the unprofitable part. This is the teaching of George *versus* Claggett.

But where you have not been misled: when you shut your eyes, you cannot claim from O'Smith what was owing to you from MacBrown. This is the lesson of Cooke & Sons *versus* Eshelby.

You should always keep a look-out for customs of particular trades and businesses in relation to unknown principals. A shipping broker at Lloyd's made a charter-party "on behalf of merchants"—a charter-party is an agreement to hire a ship, either for so many weeks, months, or years, or else for such-and-such a voyage or voyages. It was customary at Lloyd's for brokers to charter ships "for merchants," and then to get a number of merchants to join in taking up the room in the ship. Jones, for instance, takes a share in the vessel, Smith takes two shares, Brown half a share, and so on. When the ship-broker has collected a sufficient number of charterers, his work is done. The merchants deal directly with the shipowner, and the broker has no further responsibility. But the broker, when first he makes the contract with the shipowner, is



personally liable to fulfil it, because he has not revealed the names of "the merchants" for whom he acts. And, by a custom of the business, those names must be revealed to the shipowner within a certain number of days—if not, the broker remains personally liable.

I have said, at the beginning of this sub-section, that an agent acting avowedly for an unnamed principal is personally liable until that principal's name is revealed; and when it is revealed, the creditor can choose whether he shall continue to hold the agent liable, or "go for" the now-disclosed principal. This liability, like any other, can be modified or altered by express agreement. For instance, Jones ordered goods from Edwards of Swansea, to be sent by sea to London. Jones avowed that he was only an agent in the matter, but did not mention the name of the London firm for whom he acted. He insisted on a clause being put in the contract of sale, thus: "Jones is not to be responsible to Edwards after the goods have been put on board ship." Some unpleasantness arose after the goods were shipped, and Edwards tried to make Jones liable; but on Jones showing the agreement, the Court exonerated him. "Evidently," said his lordship, "this is the very thing Jones wished to protect himself against, and Edwards agreed to it."

(4) When the agent represents himself to be a principal—*i.e.* when he actually says, "I am dealing with you on my own account"—his principal cannot afterwards step in and claim the benefit of the contract: at all events, without allowing for any claim you had against the agent personally. Mrs. Humble was a widow, whose husband had left her a ship called the *Ann*. Mrs. Humble did not attend to business herself, but left her affairs in the hands of her son, Mr. C. T. Humble. The son entered into a contract of charter-party with a Mr. Jameson Hunter, as follows: "It is mutually agreed between C. T. Humble, Esq., owner of the good ship or vessel called the *Ann*, and Jameson Hunter," etc. When Jameson Hunter refused to pay the freight (*i.e.* the sum agreed on for hire of the vessel), Mrs. Humble brought an action against him. "Pray, madam, who are you?" inquired Hunter. "C. T. Humble, Esquire, I know; but I do not know Mrs. Humble, widow." Mrs. Humble proceeded to prove herself to be the real owner of the good ship *Ann*, but the judges would not listen. "This may be all very true, madam," said their lordships, "but you are claiming under a contract made by your son. In that contract he says, 'I am the owner of the *Ann*.' Now you say that you are the owner of that craft. You cannot claim the benefit of that contract and repudiate the rest of it. You must either adopt the whole or none. If you adopt none—you are out of Court. If you adopt all, you are equally out of Court, because the very first sentence, 'it is mutually agreed between C. T. Humble, Esq., owner of the *Ann*,' cuts the ground from under your feet. If your son is owner of the *Ann*, he must bring the action, not you."

I daresay the "lone widder" felt herself aggrieved by this judgment; but I will undertake to prove its soundness. If you advertise a house to let, and I come with intent to hire it, and I ask you "Who is the owner?" and you reply "I am," I promptly hire the house, because I know you bear the reputation of being a just and indulgent landlord. I may even be willing to

pay a little more rent for the privilege of becoming your tenant. A pretty state of things it would be if, next day, old Patchcross, the notorious skinflint, turned up and claimed that you were only his agent, and that I was bound to him, not to you. In point of fact, the judgment in the Widow Humble's case was only an emphatic application of the principle that you shall not be allowed to take advantage of a false representation, whether made by you or by your agent.

There is a fifth contingency that may arise: a man may make a contract with you **representing himself to be an agent when he is not**. This may be a deliberate lie—a piece of deceit—or it may be a misrepresentation only. For instance, if MacBrown comes to me and says, “I want you to give me an order. I am travelling for the Ballyhooley Cycle Company”—when the fact is that he has two Ballyhooley bicycles for sale, but does not represent the company at all—the chances are that MacBrown is telling a deliberate lie for some purpose of his own. If you give him an order for a cycle of the company's latest make, with all their new improvements, he is personally bound to pay damages. He has not the option even of carrying it out.

But it may easily happen that a man shall make a contract with you, saying that he is an agent, and believing it himself, when all the time he is no agent at all. “How does this happen?” you ask. Well, I will tell you. One day MacBrown conceives a brilliant idea. “How beneficial would it be to the world at large, how good for trade, and how profitable for me, if I could form a company to export pepper-pots to Paraguay and sell them at a large profit to the natives!” No sooner said than done. MacBrown marches down to the City, buttonholes O'Smith, Hifea, and another financier or two, and to them unfolds the scheme. They willingly consent, and draw up a plan for floating the Paraguayan Pepper-pot Company, Limited. But before the company is properly formed (*see* Chapter V. of this Book), the party think it wise to learn how much they will have to pay for the pepper-pots. Wherefore MacBrown comes to you, a manufacturer, and says, “I want to know your prices for making pepper-pots in large quantities.” You quote the price; and it is so reasonable that then and there an agreement is drawn up, in these terms:—

It is hereby agreed that Septimus Smiles will make for and sell to the Paraguayan Pepper-pot Company, Limited, 5,000 gross of German silver pepper-pots at the price of 22s. 6d. per gross. Goods to be delivered on the 2nd of December, 1897. The company to pay carriage.

(Signed) S. SMILES.

*Q. MACBROWN, agent for and on behalf of  
the Paraguayan Pepper-pot Co., Ltd.*

Mr. MacBrown has rendered himself liable to fulfil the contract himself. The company is not bound by it, for the very simple reason that no company exists; and if the formalities are afterwards completed, and the company comes into existence, it can never be bound by it. As it cannot be made liable to perform its part of the contract to Smiles, neither can Smiles be compelled to perform his part to it. In short, as between Smiles and the company, when it comes into



being, there is no contract at all. Smiles's only remedy is to insist on MacBrown performing the agreement himself, or paying damages instead. In legal phrase, no man can be agent for a non-existent company, any more than one can be the agent for a non-existent person.

This leads us up to the discussion of another important point, which I will first state in dogmatic form, thus:—When A says, "I am an agent" (without saying for whom), and on the strength of it makes a contract with you, when all the time he was acting for himself, no harm is done. A is, of course, personally liable to perform one end of the agreement in your favour; you are compelled to perform the other half in his favour.

But—note the difference—when A says, "I am agent for Jones & Co."—which is untrue—there is no contract at all, because you trusted him only as Jones & Co.'s representative. The only result is that when you find out the untruth of A's statement you can bring an action against him personally to recover any loss you may have sustained.

Thirdly, when the pretended principal does not exist, the so-called agent is personally liable to fulfil the contract. This may happen in one of two ways: (1) When a man makes a contract as agent for a company not yet in existence (*see* above); (2) When the alleged principal is a fictitious person—*e.g.* if I make a contract with you as "agent for P. W. Grafton, of 31, Elzevir Street, Swindon," and there turns out to be no such person in existence—I am personally liable to fulfil the contract.

*For example:* (1) Jones had a bill of exchange, drawn on Robinson & Co. He went to Robinson & Co.'s office, where he saw someone of the name of Walters, to whom he showed the bill. Walters, who was only a visitor in the office, wrote across the face of the paper, "Accepted, Robinson & Co." It was decided that Walters was liable to pay damages to Jones for having represented himself to be agent of Robinson & Co. when he was not.

(2) A man named Schmaltz made a contract to hire a ship (charter-party) from one Avery. He described himself as "G. Schmaltz (agent for the freighters)." In fact, he was hiring it for his own use. It was decided that he himself was able to say afterwards, "I am really the principal." The difference between this and case (1) consisted in this: that in (1) the alleged principal was named; in this case no one was named as principal.

(3) Ebury, who was promoting a company, gave a cheque, signed "Ebury, *per pro.* the A. B. C. Company." The company was not then in existence. It was decided that Ebury was personally responsible to pay the cheque. The result was the same as in case (2); but the facts were different, because in this case the alleged principal was non-existent.

**You must stand or fall by your agent's conduct.**—That is clear. If you employ an agent to act for your benefit, his acts are your acts. This is put concisely in the maxim, *Qui facit per alium facit per se*—which, being translated for the benefit of my lady readers, means, "He who does a thing by the hands of another, does it himself." On this ground it is that a master is responsible for acts done by his servants while doing the master's business; and a principal must answer for the defaults of his agent when the latter is acting *within the scope of his*

*agency.* Take particular notice, please, of the words in italics, for they are very important.

Let us suppose, for instance, a case that must frequently occur in business. MacSwell, Jonbull & Co. are wholesale tea merchants, and they send round their traveller, Mr. Gibley, in the usual way, to retail shopkeepers. Mr. Gibley has instructions to sell a special brand of high-class China tea at 1s. 10d. a pound—no less; but when he calls on Green, Horne & Co., the largest grocers in Sasston-on-Sea, he finds them unwilling to pay more than 1s. 9d. Unwilling to lose a good order, at last he says, "I'll tell what I will do, gentlemen. If you will give me an order for 100 chests, you shall have it at 1s. 9d. a pound." One hundred chests are ordered; but when MacSwell, Jonbull & Co. receive the order from their traveller they refuse to carry it out. Green, Horne & Co. have a good case for damages for breach of contract. Why? Because they did not know of the traveller's instructions, and it is usual for travellers to have a good deal of discretion in the matter of prices. The traveller was acting within the scope—the usual scope—of a commercial traveller's authority.

Again, suppose the traveller makes a statement as to the quality of the tea, representing it to be better than and different from what it really is. The consequences are exactly the same as though MacSwell, Jonbull & Co. had personally made the statement. Or, again, you have a piece of land to sell, and you instruct an estate agent to sell it for you. I enter into negotiations, and in the course of them I ask the agent, "Has the adjoining owner any right of way over this plot?" "No," is the answer, which turns out to be untrue. I am justified in throwing up the contract as soon as I discover that a right of way exists.

**When an agent oversteps his authority**, sometimes his principal is bound by what he does, sometimes not. Thus, if I entrust an estate agent with a house and grounds to sell, and he agrees on my behalf to sell it to you for £3,000, but to allow half the purchase money to remain on mortgage, I am not bound by the contract, unless I actually gave him authority to make such a bargain. Why not? Because (1) I did not authorise him to allow any of the purchase money to remain on mortgage; and (2) it is not usual to allow an agent to make such a bargain at his own discretion.

The agent having acted, then, beyond his actual authority, and outside the scope of his apparent authority, I am not bound to sell you the house and grounds according to the contract that he professed to make. But if I wish to repudiate his act in one particular, I shall find myself compelled to give up the whole contract. Thus, the agreement made by him with you consists of two parts—namely, (1) an agreement for you to buy the house and grounds for £3,000; and (2) an agreement for me to allow £1,500 to remain on mortgage. My agent had full power to make the first part of the contract, but not the second. When I hear of it, I say to you, "I shall hold you to the contract of sale, but my agent had no right to agree about the mortgage, and I shall not abide by that arrangement. You will have to pay me the £3,000 down." Such claim has been made more than once, but the judges have always held that no principal can adopt part of his agent's bargain and repudiate the other part. He may be entitled to repudiate the whole, but he can never stick to the benefit and throw overboard



the liability. In short, you take your agent as you take your wife—for better or for worse.

So that you are not bound by your agent's acts or contracts when he goes beyond his instructions, unless, by something you have done or left undone, you "hold him out" as possessing authority to do what he did. A good instance of this "holding out" is given on page 518—the case of a principal who allows his traveller to take money and give a receipt for it in one case, and the next time turns round and says, "My travellers have no authority to receive money."

Another example is where you (the principal) allow the other party to think that your agent has unlimited authority. For instance, Jones goes to Smith one day and offers to buy a house belonging to Smith. Smith says, "Call on my solicitors, Messrs. Castor and Pollux, of Lincoln's Inn Fields, and talk to them about it." Jones does call, and negotiations are opened. Castor and Pollux, on behalf of their client, demand £600 as the price of the house. Jones objects to pay so much, and calls on Smith again, thinking he may be able to persuade him to accept £50 less. But Smith wisely refuses to have anything to do with it. "Settle it with the lawyers," says he. "I leave all business connected with the sale of my property in their hands." After that, Jones will be justified in assuming that whatever terms he makes with Castor and Pollux will be binding on Smith, for Smith himself has represented that his solicitors have the fullest powers.

So much for your own liability, or non-liability, when your agent oversteps his authority. But what about the agent himself? Suppose your agent makes a contract in your name beyond what you have told him to do, and you are not liable by "holding out." As I have said, you are not bound by the contract. But the other party may have gone to considerable trouble and expense before you repudiate your agent's acts. Is he to have no compensation for that? Let the following case show:—Mr. Dunn Gardiner was a landed proprietor, whose agent (factor) was Mr. Wright. Farmer Collen wished to take a lease of one of Dunn Gardiner's farms, so he applied to Wright, and Wright, saying that he had authority to do it, agreed on Mr. Dunn Gardiner's behalf to grant a lease of the farm to Collen for  $12\frac{1}{2}$  years. As a matter of fact, Wright had no authority to grant any lease for more than seven years, and when this  $12\frac{1}{2}$  years' lease was taken to Mr. Dunn Gardiner to sign, he refused to sign it. Now, the farmer, relying on the agent's saying that he had power to make the contract, had gone to the trouble and expense of moving to the new farm; and as he had to turn out again, he looked round to find someone from whom he could extract compensation. He "went for" Wright, on this ground: "You warranted," said he, "or contracted that you had power to give me a lease for  $12\frac{1}{2}$  years when you really had no such power. You have broken your contract, and must pay damages for so doing." There was a long and learned argument before the judges on the point. Wright's counsel argued that his client could not be liable for damages for fraud, because the misrepresentation was innocently made, for Wright really did believe that he had the authority to agree for a  $12\frac{1}{2}$  years' lease. To this proposition the barrister for Farmer Collen agreed. "Further," argued Wright's counsel, "my client did not contract that he had authority. Where is the consideration for such a contract? He did not warrant it to be true. Where

is the consideration? What was he to get for his warranty?" The answer was: "He was to get Collen to execute the contract for the  $12\frac{1}{2}$  years' lease. The consideration was that Collen undertook a responsibility at his (Wright's) request" (see page 277). This view was finally adopted by the Courts. It comes to this: when a man represents to you that he has authority to make a certain contract on behalf of me, and on the strength of it you make the agreement; if the statement is true, I (the principal) must carry out the contract. If it be untrue, the agent must pay you damages for having led you astray.

**When a man does anything in your name without your authority or consent**, of course you can refuse to have anything to say to it. But you can if you like, adopt what he has done, or, as lawyers say, ratify the acts of an unauthorised agent. If you do adopt his acts, the effect is this: you place things in the same position exactly as if you had told the man to act for you beforehand. In other words, you make him your agent after the fact.

I want you to note particularly the two points in connection with this doctrine or **adopting or ratifying the acts of an unauthorised agent**. The first point is that you can ratify such acts at any time after they are done. The second is, that when you ratify, your ratification goes back to the time when the act was done. These two principles have been carried by the judges to a very great length. In fact, they have been carried to their uttermost logical issue. The holder of a bill of exchange indorsed it over to A G, telling him that they were given to him (A G) as agent for a Mr. Ancona. A G took the bill, and brought an action against Mr. Marks, the person liable to pay. The action was brought in Ancona's name, but it was not until some time after the commencement of the lawsuit that Ancona knew anything about the bill. When he did hear about it, however, he ratified what A G had done in his name. Marks raised this defence:—"When this action was brought against me in Ancona's name, that gentleman knew nothing about it, for A G, who really started the action, was not Ancona's agent, and had no authority to commence legal proceedings." This defence was of no avail, for the judges held that although A G's proceedings were not adopted by Ancona until very late in the day, yet, when they were adopted, the adoption went back to the first beginning of the business—that is, to the moment when A G took the bill in Ancona's name.

Another case is still more remarkable. A Mr. Lambert had his eye on some property belonging to a company called Bolton Partners, Limited. One day he wrote a letter to the managing director of the company, offering to buy the property on certain terms. Now, the managing director had no power to accept such an offer, for no one but the board of directors has any power to make a contract of such a nature so as to bind the company. But this managing director hastily summoned a meeting of the works committee of directors, who immediately authorised the manager to accept the offer. But the works committee, not being the whole board of directors, had no power so to authorise the manager. However, the manager wrote and accepted the offer on behalf of the company. The offer was made by Lambert on the 8th of December, 1886, and accepted by a letter from Scratchley (the manager) on the 13th of December.

Of course, if the manager was really the agent of Bolton Partners, this was a



complete and binding contract for the sale and purchase of the property, from which neither Bolton nor Lambert could escape. On the 13th of January, before the directors had ratified or confirmed their manager's action, Lambert wrote, withdrawing his offer. Then the directors held a meeting and confirmed what their manager had done in accepting the offer as their agent; and they wrote to Mr. Lambert, telling him that they should hold him to his bargain. "But," replied Lambert, "I had withdrawn my offer before you had heard that I had made one." In reply, Messrs. Bolton Partners pointed out that the offer had been accepted by their agent before it was withdrawn, and that an accepted offer cannot be cancelled (p. 261). The answer was, "Scratchley was not your agent when he accepted my offer."

Neither party would budge, with the result that a very pretty little fight took place in the Court of Chancery, where the point was decided in favour of Bolton Partners. The ground of the judgment was as follows:—(1) There was an offer and acceptance—a complete contract—on the 13th of December, provided that Scratchley had authority to act for Bolton Partners; (2) on the 28th of January Bolton Partners adopted Scratchley as their agent in the matter, and ratified all that he had done; (3) ratification dates back to the time of the original act; (4) it logically follows that Bolton Partners' ratification relates back to the 13th of December, when Scratchley first acted in their name; (5) it further follows that Scratchley's acceptance of Lambert's offer to purchase was accepted by him as the authorised agent of Bolton Partners.

Therefore, when the contract was made it was complete, and Lambert's attempted revocation was of none effect.

I need hardly point out to what a length such a decision carries us; and, indeed, it is a decision that has been found fault with in many quarters—notably by Sir Edward Fry, once a Lord Justice of Appeal. For my part, I find it eminently reasonable. Nor do I think Mr. Lambert had any reason to complain, for if he did not mean his offer to be binding, why did he take the trouble to sign his name to it?

I have pointed out, a few pages back, that a man who pretends to act as agent for a non-existing company cannot have his acts ratified after the company has been formed (p. 531).

Now let me say a word or two about the contract of agency itself; that is to say, as to **the relations between principal and agent**. It will be convenient to discuss this topic in two parts—the first relating to the duties and liabilities of the agent to his employer, and the second discussing the duties and liabilities of the principal to the agent. The rights and duties here treated of concern all principals and all agents. Those which refer to special classes of agents will be dealt with in the sections devoted to these special classes.

The first duty of an agent is to **obey instructions**. If he does not, he is always liable to his principal to pay compensation for any loss sustained through disobedience. I want you to keep this liability quite separate from any liability of the principal to a third party. For instance, Macpherson of Glasgow is the Scottish agent for Brass of Birmingham, electro-plate manufacturers. The Scottish agent has been in the habit of taking orders from

Faremade of Perth, allowing him three months' credit. One morning Macpherson receives instructions not to take any more credit orders from Faremade. Notwithstanding this, the agent accepts another order from the man of Perth at three months' credit. Brass is bound to carry out the order and to allow the credit, because Faremade was induced by previous dealings to believe that Macpherson had power to make such an agreement. But if Brass sustains any loss, he can come upon Macpherson to make it good; for every agent must obey his instructions to the letter.

The second duty of an agent is **to carry out his instructions with diligence**. The Scottish lawyers have a very good way of showing what diligence is. It is not enough, they say, to do the business in the same way that you manage your own affairs, unless you manage your own affairs with the utmost care. Thus, an agent with authority to sell goods on credit, ought not to allow any customer's account to run up to an inordinate figure, or for an inordinate time. If he does, and the customer goes smash, the too credulous agent will find himself liable to make good his principal's loss. And it will be no answer for him to say, "I trusted the man myself to just the same extent. I have been deceived, and have lost as much as you have or more." The obvious answer is, "If you choose to be careless about your own money, that is your look-out. I pay you to act as my agent, and it is a breach of your contract with me to act carelessly." Instances multiply themselves. You appoint MacTavish your factor to collect the rents of your house-property. He allows one tenant to fall into arrear for more than a year's rent. Then the tenant flits to distant parts, and you are unable to trace him. MacTavish is liable to make good the arrears.

O'Brien is your agent in Dublin. You authorise him to take bills of exchange at six months' in payment of a debt due from O'Connor to you. He allows O'Connor to palm off on him bills drawn on and "accepted" by a man not worth sixpence—an undischarged bankrupt, whose position could have been ascertained by a little inquiry. O'Brien must recoup you for whatever loss you sustain on the bills; because, though you told him he might take bills for the debt, you did not mean, and could not have meant, bills that were practically waste paper. Further, an agent who takes a cheque when he should have taken cash is guilty of a breach of duty.

"Diligence," again, is a relative term. When you employ a solicitor to act for you in a matter such as solicitors generally undertake, he is not "diligent" unless he uses such legal skill as every solicitor ought to have. Of course, he is not liable for a mere error of judgment; but he is liable for gross errors of incompetency. The same rule applies to all agents who are engaged because of their (real or supposed) special skill or knowledge. Thus, one Mallough engaged an insurance broker named Barber to act as his agent in drawing up a contract of insurance of a ship. Barber's instructions were: "Effect a policy on the ship *Expedition* and her freight at and from Teneriffe to London at ten guineas per cent." Barber accordingly insured, but omitted to put in the policy the clause, "Liberty to touch and stay at all or any of the Canary Islands." It was proved up to the hilt by the testimony of insurance brokers that when



one was asked to effect a policy on a ship "at and from Teneriffe," one always put in the policy a "liberty to touch and stay at all or any of the Canary Islands"; for a ship hardly ever took in a full cargo at Teneriffe, and would want to call at the Canaries to fill up. The *Expedition* was in this plight. She could not get full cargo at Teneriffe, so she called at Lanzerotte, in the Canaries, to complete her loading. On the way from there she was captured by a French frigate. When Mallough put in his claim for the £550 insurance, he was met by the reply, "Your ship broke the conditions of the policy. The policy is from Teneriffe to London—which means straight from Teneriffe to London—not round about by way of the Canaries. Had she come straight to London, she probably would not have been captured." This is what is called in insurance-broking circles the defence of "deviation," and a very good defence it is; for a ship insured from London to Amsterdam, for instance, would not be allowed to go round about by way of Dieppe. She must go as straight as she can across the North Sea—being allowed to deviate only to save life. Wherefore Mr. Mallough did not get his insurance money. Then he turned on Barber and said: "You ought to have taken care to insert the usual clause giving me liberty to call at the Canaries. Now you must pay me the £550 I have lost by your carelessness." Barber thought not; but the Chief Justice and a jury convinced Mr. Barber of his error; and he ultimately paid.

The third duty of every agent is **to render an account** to his principal of all things connected with the agency business. And he should keep his accounts in such a state as to be ready for the principal at any time when called for. If you find your agent muddled in his accounts, you are at liberty to say, "I discharge you," because, it being his duty to keep his accounts in a reasonably clear manner, he has committed a breach of duty by allowing them to get mixed up.

The fourth duty of an agent is **to disclose everything to his principal**. This is a most important matter, and in business life it generally crops up in one of two ways. The first is, *where an agent assumes a position adverse to his principal*. Let me explain this fully. When you employ a man as your agent he is not allowed to deal with you himself, however honestly. For instance, if you employ me to sell something for you, I cannot purchase it myself. Why not? Because you have put your interests in my hands, and I have undertaken to protect them. Now, if you say to me, "Sell this horse for me—don't take less than £20," it is my duty to sell it for the highest price that can be obtained. That is obvious. But if I sell it to myself—that is, keep the horse and forward you £20, or even more, out of my own pocket—I am acting as buyer. Now, my interest as buyer is to obtain the nag for as low a price as possible. That, again, is obvious. And it is equally obvious that when my duty and my interest conflict, interest will stand the better chance, however honest I try to be. And so the Courts of Law have always said and have firmly enforced the doctrine that one employed as agent to sell must not purchase for himself. Equally, and for the same reason, an agent employed to buy must not sell his own goods to the principal. The case of *Robinson versus Mollett* (p. 330) is a good illustration.

You remember there that a broker was instructed to buy tallow for A B. What he did was to sell to A B some tallow of his (the broker's) own. A B was allowed to repudiate the sale, although the broker only charged the market price, and the tallow was of the right quality ; so that there was no suspicion of any dishonest intention or dishonest dealing on the broker's part.

There is also the case of *De Bussche v. Alt* (p. 525), when a sub-agent who had bought a ship from his principal, was not allowed to retain the benefit of the purchase, though the honesty of his motives was not called in question. Honesty of motive does not make the least difference. It is a question of honesty of act ; and the principle is that an agent must act as agent—*i.e.* his contracts must be made *for* his employer, not *with* him.

There need not be the least difficulty when an agent wishes to deal personally with his principal. Thus, there was nothing to prevent the tallow-broker above-mentioned from writing to his principal, "I have tallow of my own to sell. Will you buy it ?" Then the principal would have known with whom he was dealing. As it was, he did not know. Again, why could not Alt, the Japanese sub-agent, if he wished to buy De Bussche's ship himself, cable, "Will buy ship for self for 90,000 dollars" ? The point is that you shall not, while pretending to act as agent, act as principal. If you want to trade on your own account, say so, and then you and the other person contract on equal terms.

The second and—more's the pity—the more frequent kind of transaction to which the principle of full disclosure is applied is that of **secret commissions and secret profits**. In September, 1896, Sir Edward Fry wrote to *The Times* several letters exposing the existence of a system of secret commissions permeating all classes of society. Sir Edward, with the accumulated force of an experience at the Bar and on the Bench extending over half a century, laid bare the details of this pernicious system ; and his denunciations excited a great deal of attention. But he only revealed what had been an open secret in the commercial world for many a year. Many a woman of society induces her friends to patronise this dress-maker or that milliner in return for a commission from the tradesman. Men about town extol, in a well-bred way, particular brands of wine and cigars—pocketing a little cheque on orders introduced. Even some doctors, Sir Edward Fry asserted, carried with them the cards of undertakers whom they "recommended" to the friends of their deceased patients. What a slur on the noblest of professions ! But these people do not come within the purview of this section. They do nothing legally wrong—and would not do anything morally wrong, if they disclosed the fact that they are paid agents.

The people with whom I deal here are those agents who, not satisfied with the remuneration they receive from their employers, "make a bit," as the phrase goes, out of the other side. The agents particularly liable to temptation are those known as "buyers." A buyer is, as many of my readers know, a man employed by a shopkeeper or other trader to buy goods from manufacturers and wholesale houses. It is his business to look out for novelties, and see that his employer gets good value for his money, and to take care not to lay in too great a stock of any particular article. The buyer is generally a man of great experience in the trade ; and usually receives a very good salary. Yet



there are many of this class who are always open to a suggestion of "making a bit."

This is how it is done:—Cotton & Kneadle are wholesale clothiers in the City. They have a buyer named Blank, whose duty is to purchase on their behalf the cloth required for the business. To him one day comes a cloth manufacturer, with samples of woollen cloth, which Blank examines. Seeing that no order appears to be forthcoming, the manufacturer says, "I will make it all right for you." "How much?" inquires Blank. "Two-and-a-half," is the ready reply. And so an order is given; and the manufacturer gives Blank a commission of  $2\frac{1}{2}$  per cent. on the value of all goods sold by him to Cotton & Kneadle. Sometimes the "bit" does not take the form of a regular commission, but is a "present," that is, a £5 or £10 note sent by post, or some useful or fancy article, such as a ring or a scarf-pin, or a hare and a turkey at Christmas or the New Year. An old firm in Sheffield were found guilty of "presenting" a set of carvers to the cutlery buyer of Oetzmann & Co. But whether the "bit" takes the form of a regular commission or a "present" in money or in kind it is always the wages of iniquity.

What is the liability of an agent who accepts anything from the other side without his principal's consent? In the first place, anything that he so receives is the property of his principal, and, in the second place, he is liable to pay damages for breach of duty. Take such cases as these: An army agent was employed by a Mrs. Turnbull to provide for her son an outfit for India. The various items of the outfit were procured through the agent, who was paid by Mrs. Turnbull a commission for his services. The tradesmen who supplied the articles invoiced them to the agent; and the latter received from Mrs. Turnbull the full invoice price wherewith to pay the tradesmen. It afterwards turned out that Mr. Agent received from these tradesmen a discount on all their accounts—being thus paid by them to sell, and paid by Mrs. Turnbull to buy. The lady put the case into her solicitor's hands, with the result that the agent was ordered to give her all the discounts he had received. Vice-Chancellor James said, "A person who is dealing with another man's money ought to give the truest account of what he has done; and ought not to receive anything in the nature of a present or allowance."

A Mr. Morison employed X Y Z, a ship-broker, to purchase for him at the lowest possible price a certain steamship. X Y Z went to another broker, who acted for the seller, and offered to buy, which he ultimately did. Mr. Morison discovered that X Y Z had received from the seller's broker the sum of £225—that is, he had taken commission from the other side as well as from his own employer. Result: X Y Z had to hand over the £225 to Mr. Morison. "An agent is bound," said the judge, "to account to his employer for all profits made by him in the course of his employment or service. . . . The money absolutely belongs to the employer."

Again, in the case above mentioned, where a firm called Long & Co. gave a set of carvers as a "present" to a buyer in the employ of Oetzmann & Co., the carvers were really the property of Oetzmanns, and not of their buyer, because it was "profit made by him in the course of his employment."

This case made a good deal of impression on the commercial world at the time, because of the strong remarks made by Lord Chief Justice Russell of Killowen. That eloquent Irishman and learned judge described the growing practice of giving secret commissions and presents to agents as "a cancer that is eating away the life of honest business." And the case—not the first of its kind by any means—is useful as showing the liability of those who give such "presents."

Long & Co. gave, as I have said, some cutlery as a present to one of Messrs. Oetzmann's buyers. The buyer, who had really been sent by Oetzmanns as a sort of detective, promptly informed his employers. The latter brought an action for damages against Long & Co., and succeeded in obtaining damages to the tune of £50 from Long & Co. From which we may see that the "cancerous" practice is rather dangerous, for should the principal find out that you have bribed his agent, he can make you smart for it. It will not be necessary for him (the principal) to show that you have really done him any damage. For instance, if Brown & Co. send their buyer to me to purchase a stock of earthenware, and I, anxious to obtain an order, give the buyer a china teapot, and the buyer gives me the order, I am liable to pay damages to Brown & Co., although the earthenware supplied to them is of better quality and at a lower price than that they could have obtained elsewhere.

In many other instances the duty of an agent to disclose everything connected with his dealings as agent crops up. Whenever a man employed as agent has any interest in the transaction beyond what he is paid by his employer, he must reveal it fully to that employer. If I employ you to buy property for me from Jones and Brown, the trustees of Robinson's will, and you happen to be one of the legatees under that will, so that you will benefit by the sale, you ought to reveal the fact to me. The reason is obvious. The business of the world cannot be carried on without agents. Nowadays I should no more think of trying, say, to let my houses without the aid of an estate agent than I should think of trying to make my own clothes without the assistance of a tailor. If I did try, I should probably waste time to twenty times the value of the agent's commission. Again, a cutlery manufacturer of Sheffield would find it almost impossible to carry on a London trade without employing an agent who lives on the spot, or, at least, without a London traveller. And in all these cases it is essential to the proper conduct of business that the agent should be absolutely trustworthy. If he is not wholly devoted to his employer's interest, the employer is bound to suffer. And that is the reason of the rule that I have tried to explain in all its branches—an agent must disclose everything to his principal. He must not receive secret commissions or bribes, presents or tips. Even a good dinner may be something very like a bribe. He must not have any interest in the business that is not identical with his principal's. For, as Lord Ellenborough once put it, "No man should be allowed to have an interest against his duty."

**Using the principal's money.**—It frequently happens that an agent has left in his hands for a considerable time some of his principal's money. There is, of course, nothing against this, so long as the principal knows that it is there. But when an agent uses such money in his own business, or for his own purposes, he



will be compelled to pay either interest—as though it were a loan—or else to hand over all the profit actually made by means of that money. Thus, if I am an agent for X Y & Co., and I keep a separate banking account, into which I pay money received on their behalf, and one day I draw a cheque on this separate account, pay it into my private account, and use it as my own, I must pay interest to X Y & Co. on the amount so drawn.

But suppose I were to draw out £1,000 of my principal's money and, without mixing it in any way with my own money, buy 1,000 £1 shares in a company. The shares go up five shillings apiece; so I sell out, realising a total profit of £250. My principals, X Y & Co., are entitled to claim all that profit as theirs, because all the money by which the profit was made was theirs. But should the shares go down instead of up, and I sell out at a loss of £250, X Y & Co. do not bear the loss. In fact, they are entitled to come upon me for their £1,000 with interest at 4 per cent.

The difference between the last illustration and the one given first in this sub-section is that in the first case I mixed up my principal's money with my own, and in the second case I used my principal's money in a lump for a particular speculation. When I take £100 of my principal's money, and pay it into my banking account, where I already have £2, and then I draw a cheque on my account for £100 and speculate with it, £98 of that £100 is my principal's, and £2 my own. So that if I buy 100 shares at £1 each, it is impossible to say which two of the hundred were bought with my £2. In these circumstances the whole 100 shares belong to me, and my principal has only the right to demand from me the £100 with interest. If, on the other hand, I keep a separate banking account for my principal, and pay for the shares with a cheque drawn on that account, clearly the whole 100 shares are bought with his money. He can, therefore, claim the 100 shares if he likes, instead of merely charging me with the £100 and interest.

**Unpaid agents** differ, somewhat, as regards liabilities, from paid agents. This is only reasonable, if you think of it. When I undertake to manage the affairs of Brown, who is going away for a year, it makes all the difference whether I agree to do it for pay, or merely out of friendship. An agent who undertakes to do something for you without pay is not liable if he does it not. But if he does it at all he must do it properly. Such was the case of a man who undertook, out of friendship, to remove certain casks of wine from a cellar, and did it so carelessly that one or two casks were stove in, so that the wine was lost. He had to pay the value of the precious fluid. Suppose he had sold some of the wine, he would have had to account for the proceeds. On the other hand, had he changed his mind and left the casks in the cellar, he would have incurred no risk, though his failure to keep his word might have put his friend to vast inconvenience and considerable loss.

The duties and liabilities of the principal to the agent must now be considered. When we ask, "What are the duties and liabilities of a principal?" it is only another way of inquiring, "What are the rights of an agent against his principal?" and it is by way of answering the second of the queries that I shall deal with the first.

**To be paid** the agreed remuneration is an agent's first right, and to pay it is

the principal's first duty. The usual way of fixing remuneration is by a commission at a fixed percentage. Sometimes this commission is payable not only on the business done actually through the agent, but on all business which comes to the principal as a result of the agent's exertions.

It is not at all out of the way for company promoters to make such an agreement as the following :—

I [the promoter] agree to pay you [the agent] 5 per cent. on the nominal value of all shares in the Splash Dash Diamond Co., Ltd., subscribed by persons introduced by you, or introduced by those whom you introduced.

A shorter form, very much to the same effect, runs :—

I agree to give you 5 per cent. on all capital subscribed by or through your introductions.

Such an agreement works out in this wise : The agent introduces Brown, who subscribes £100. Brown introduces Johnson and Smithson, who each take up £100 worth of shares. Smithson introduces Pilkinson and Parkinson, who apply for £100 worth each. Johnson introduces Trelawney, who embarks to the extent of £1,000. The agent will be entitled to commission on £1,500, though he personally introduced £100 only. A good deal of this "introduction" business is carried on in a quiet way. There is many a man in London who, without having any visible means of subsistence, contrives to belong to an expensive club, to wear the finest of raiment, and, withal, never seems short of ready money. This is the man of whom others say, "I *cannot* tell how he does it." He very often does it by introducing his more wealthy acquaintances and friends to company promoters. As a rule, he does not tell those friends and acquaintances that for every £100 subscribed by them he receives £5, £10, or even £20.

He generally excites cupidity by remarking, "I wish I had a few odd thousands, like some of you rich fellows. I was put on a very good thing yesterday; but, of course, I could not touch it, not having any money to spare." Mr. Fatpurse, who has several odd thousands lying idle at his banker's, expresses a desire to be "put on the good thing" too, and the impecunious one obliges him. I am always suspicious, myself, of these "good things," unless, indeed, the obliging one is frank enough to confess that he is paid for introducing business.

Another very frequent form of agreement is that the agent is to have commission on all subsequent orders given by customers whom he introduces. Here is a case culled from the columns of the *Daily Telegraph*, that shows how very careful principals should be in framing such agreements. Reid & Co. were the publishers of an Entertainment Guide, and they employed A B as their advertisement canvasser. The agreement of agency was that A B should have 5 per cent. on all new advertisements introduced by him, and 2½ per cent. on all renewals of such advertisements. A B obtained a great many orders, upon which he drew his 5 per cent. for the first year. Most of these advertisements were continued, and for the second year he had 2½ per cent. Then he was dismissed from Reid & Co.'s employment. But at the end of the third year he demanded his 2½ per cent. again, and when Reid & Co. refused to pay, he put them in the County Court. The employers contended that when A B left



their service his right to commission on renewals ceased. But the learned judge refused to take this view. "If Reid & Co. meant the commission to cease when A B left their employment, they should have said so," was the comment of His Honour (*see* on this subject Section 2, Commercial Travellers).

When an agent is to be paid for introducing business, disputes very often arise upon the question whether he is to be paid upon the orders accepted by his principal, or upon the money actually received by the principal. When there is no agreement to the contrary, as a rule the agent will be allowed commission on all orders obtained by him and executed by his employer, whether the employer is paid by the customer or not. That is to say, the agent will be allowed commission on bad debts as well as good ones. This depends upon the principle that an agent has generally discharged his duty when he has obtained a valid contract for his employer. When, therefore, the employer accepts and carries out the order obtained by the agent, he becomes liable to pay commission. I point this out as **a warning**. I know quite well that many a man when he employs an agent to procure orders never intends to pay commission on bad debts. It is only throwing good money after bad. But the only way to guard against this unpleasantness is to make a plain and definite contract with the agent that no commission shall be paid on bad debts.

Sometimes, also, it is a very ticklish question whether an agent is entitled to his commission after he has introduced the third party, or only when the transaction is actually completed. An ordinary case is this:—Jackson says to Macdonald, "I want a loan of £10,000 for the purposes of my business, for which I shall be able to give the lender a partnership in the concern. I will pay you a commission of 2 per cent. if you can find anybody to join me." Macdonald hunts about and finds Wilkinson, who signs an agreement to go into partnership with Jackson, and to introduce £10,000 into the business. So far so good; and Jackson and Wilkinson set their solicitors to work to prepare proper articles of partnership. Soon they find themselves unable to agree upon a vital point. Jackson wishes to be able to terminate the partnership at the end of five years; Wilkinson objects to anything less than seven. So the contract is cancelled by mutual consent. Wilkinson does not advance his £10,000, nor become a partner. But Macdonald claims his commission all the same. He says: "I had done everything that was necessary for me to do. I procured Wilkinson to sign a valid contract, and if you chose to quarrel about details, that has nothing to do with me."

You will find this subject dealt with on pp. 383-5. As I have said there, it will be a question for the Court to decide whether the agreement for commission was to depend on Macdonald's introducing someone who should actually find £10,000 and become a partner, or whether the agent became entitled to his commission on procuring a person able and willing to pay £10,000 for a partnership. It is impossible for me to say with any safety what the result of an action would be in such a case. My purpose here is to call attention to the facts, so that my readers, either principals or agents, may know how important it is to make the point clear in their agreements. One or two things, however, can safely be said. Where the contract made by the agent goes off through the **fault of the principal**, the agent will be entitled to his full remuneration. This

right, again, the agent may lose if he absolutely agrees to give it up (*see* p. 384). The second thing is, that if the agent has made the contract so loosely that the other party can get out of it, and for that reason **no business** is done, **no commission** is due. There is an old case on this. A Mr. Denew was employed by Mr. Daverell to sell a house for him. Denew was an auctioneer and estate agent. He made a contract with X Y to sell the house, but omitted from the agreement a clause which he ought to have put in. The consequence was that Daverell was unable to carry out the agreement with X Y, and was put to the expense of a long lawsuit, which cost him almost as much as the house was worth. He lost the day, and had the house left on his hands. Then, if you please, Denew had the sublime audacity to claim his commission on the sale. He did not get it. "By the auctioneer's ignorance or carelessness," said the judge, "Daverell had been led into mischief, and he [Denew] could not claim any recompense for his services." For my part, I wonder Mr. Daverell did not sue this bold auctioneer for the expense he had been put to by the "ignorance or carelessness" aforesaid.

Again it sometimes happens that an agent, though not entitled to his commission, is entitled to some remuneration for his trouble. Mr. Reed employed a commission agent named Green to borrow £20,000 on the security of a mortgage. Green went to an insurance company, and persuaded them to sign a contract to advance the money. It is always a condition of such a contract that the borrower shall be able to show a good title to the land proposed to be mortgaged. Reed was unable to show a good title, wherefore the company refused to carry out the loan. Green's employment was in these words: "Reed agrees to pay Green a commission of 1 per cent. upon the amount of a loan of not less than £20,000 to be procured by Green." The case turned upon the word *procured*. In the end, judgment was given against the agent on one point, but in his favour on another. "Having procured the Pelican Insurance Company to agree to advance £20,000, I am entitled to full commission—£200," was Green's contention. To which the answer came: "The Pelican Company not having advanced a single farthing, you are not entitled to a stiver." The jury were asked to say what the contract really was, and they found that though, according to the agreement, Green was not to get his commission except the money was actually advanced, on the other hand, he had not agreed to take no pay at all unless the loan was made. So they brought in a verdict for £90, as remuneration for the work done in negotiating with the company and inducing them to sign the contract.

**The commission covers everything, except by custom.**—What I mean is, that an agent who agrees to accept a commission for performing certain services must take that commission as covering all acts done by him as incidental or appertaining to such services. There is a case illustrating this doctrine. Mr. Parsons, who was a Government contractor, living out of London, was obliged, therefore, to employ a London agent for the sale of his goods, and he employed one Marshall, at the agreed pay of 5 per cent. Marshall had to go to Somerset House a good many times, in order to show samples to the officials there, and he wanted to charge Parsons something extra for these



attendances. The claim was, "I get the commission for obtaining the orders and carrying out the sale. For anything else I charge extra." But it was too good to be true. It was as though a commercial traveller should say, "I want my commission for selling the goods to customers, and also 6d. a mile for every mile that I walk." Baron Rolfe said, "If the attendances came within the ordinary scope of an agent's duty, they are covered by the commission; but if they were a matter beyond his duty as an agent, he is entitled to be paid for them separately." The jury said they came within an agent's ordinary duty.

But, as I have indicated, a principal may be liable to pay for certain services as extras by the custom of the trade or business. Thus, an architect who prepares the plans of, and estimates for, a house is entitled by custom not only to a commission (generally 3 per cent.) on the amount of the estimate, but also to fees for drawing the plans and other services. The commission only covers the preparation of the estimate.

**Commissions on illegal contracts** can never be claimed in a court of law. This should be pretty obvious. For instance, you are not allowed to effect an insurance on a ship when you have no interest in that ship; nor on a cargo when it is not yours and you have no interest in it; nor on a ship belonging to a foreign foe (p. 305). Suppose you do effect one of these insurances through an insurance broker, the latter cannot claim any commission. Instances could be multiplied. If you ask me to find a man who will write a libellous article, defaming the character of Mr. Gladstone, and promise to give me a £5 note if I procure someone willing to undertake the job, though I do engage such a man for you, I have no legal right to the "five." Again by the Gaming Act of 1892, a turf commission agent has no right to **commission on bets** made for his principal. If I employ Towter to "put £10 on" Galloper for the Derby, and the odds are 10 to 1 against that horse, and Towter "puts it on" and the horse wins, and Towter receives £100, he must pay me the whole hundred, and cannot deduct a penny for his trouble (*see* p. 292).

**To indemnify, or save the agent harmless**, is the next duty of the principal. This means that when P employs A as his agent to make a contract with X, P is bound to repay A any money that the latter has paid X; and all expenses that A has necessarily incurred in making the contract; and all costs and expenses incurred by A in consequence of acting on his instructions.

Thus, P takes a bicycle to A's shop and says, "Sell this for me and I will give you 5 per cent. commission. It is a 'Slumber' machine, and you can warrant it as such when you sell it." A sells it to X, and gives a warranty that the bicycle is one of the celebrated "Slumber" make. In fact, however, it is only an inferior imitation; and when X finds out the cheat, he comes on A for damages for breach of warranty. A should ask X for a little time for consideration, and should devote that time to going to P and asking him what is to be done. If P says, "Defend the action; X is wrong," and A defends it and loses, and has to pay damages and costs, he can claim to be repaid every penny by P. But if A goes to the expense of a lawsuit without P's instructions, he can claim from P the damages, but not the costs.

There are **limits to the doctrine** that a principal must indemnify his agent against all loss and damage incurred in carrying out instructions. The line is drawn here : When an agent is instructed to commit a crime or a civil wrong, and he knows that the act ordered to be done is criminal or wrongful, he cannot claim to be saved from evil consequences. For instance, I say to Mr. Chane, a surveyor, "Will you be good enough to survey such-and-such a field for me at the usual charges?" He goes on the field and is promptly ordered off by someone who turns out to be the owner. Said owner, moreover, brings an action for damages for trespass, and gets a farthing damages and costs. Chane has to pay the farthing, the owner's costs, and his own costs. I must repay him every fraction of it, because he was entitled to assume that I had authority to send him on the field.

But suppose I say, "Survey this field, and if anyone interrupts you, knock him down," and Chane assaults and batters someone, as directed, the fine and costs imposed by the magistrate need not be borne by me, because no agent has a right of indemnity against the consequences of an illég al act.

The same rule applies to illegal contracts, as well as crimes and wrongs. If I, as agent for Nincompoop, make a bet with Towter, and lose, and I pay Towter, I cannot claim the money from Nincompoop. This is another result of the 1892 Gaming Act.

But betting and illegality barred, I am always bound to keep my agent from loss through carrying out my orders. If it were not so, I suppose no one would ever be an agent ; for it is bad enough, sometimes, to have to pay for mistakes and blunders and wrongs done in working for one's own benefit, without having to suffer for work done in the interests of another.

It only remains to say that an agent who does his work so badly, through ignorance or carelessness, that his employer derives no benefit, has no right to indemnity, any more than he has a right to commission. Also, an unpaid agent has as good a right to indemnity as a paid one.

The third right of the agent is to have a **lien on his principal's goods or money**. The word *lien* means *hold*; and when we say that an agent has a lien on his principal's property, we mean that he has a right to hold that property until some claim is satisfied. Now, an agent's claims against his principal are—(1) for his commission, (2) for indemnity ; and an agent generally has the right to retain all property in his possession until those claims are satisfied.

I want you particularly to notice one thing, which is this:—An agent almost invariably has a lien on property for his commission and expenses in relation to that particular property. On the other hand, he very rarely has a lien on one set of goods or one sum of money for his charges in relation to another set of goods or another sum of money.

I shall best explain this by an illustration. Jones requests Smith to purchase goods for him on commission. Smith buys the goods, and pays £500 for them. His commission at 5 per cent. comes to £25 ; and he has had to pay £5 for carriage. He can refuse to hand over the goods to Jones until Jones pays him the £530. But suppose Jones owes Smith £100 on a former transaction. Smith has no right to say, "I will not hand over these goods unless you pay me that £100



also." The reason is that the right to stick to the goods until all claims have been discharged is limited to the claims arising upon those goods themselves.

There are some cases, however, in which an agent has a general lien ; but these rights always depend on custom of trade. A banker, for instance, has a general right to hold his customers' bills of exchange which are given to him to collect, not merely for his charges for collecting those particular bills, but also for the balance of account.

Perhaps I may say here that an innkeeper has a right to retain all the goods brought on his premises by a guest, until that guest has paid his bill. This right was contested once, in the case of a man who went to an inn in a carriage and pair. The horses and vehicle were taken to the stables, and the guest ran up a little bill for refreshments for himself and his beasts. He objected to pay his account ; so mine host detained the carriage and the horses, as well as the guest's personal luggage. Then the guest offered to pay the stable charges, and demanded his equipage. He said, "If I offer to pay what I owe for stabling and feeding the horses, you cannot detain them." But a judge took a different view. His lordship laid down the law to be that an innkeeper had a right to retain all the property that his guest brought to the inn until every penny that the guest owed was paid. This right does not extend to lodging-house and boarding-house keepers (*see* p. 234).

There are several points connected with the right of lien of which many business men seem to be ignorant. An agent has no right to retain his principal's property merely because the principal owes him money. In the first place, he cannot retain property or money unless it has come into his hands in the ordinary course of the agency. In the second place, the debt for which he retains the property must be an agency debt. Take this case:—Macgregor of Glasgow has lent to Smith of London £50, for which he holds Smith's I O U. A few weeks after the loan Smith asks Macgregor to buy, as his agent, a cargo of American bicycles, then due at Glasgow. Macgregor does what he is requested to do, and pays £5,000 for the cycles. He can claim to keep the machines until Smith pays him the £5,000 and his commission ; but he has no lien for the money lent. You see, his claim for £5,000 and commission is in his character as agent. His claim for £50 is in a different character—that of lender. Again, a solicitor has a lien upon all deeds and papers in his possession belonging to his client ; and he is not compelled to part with them until the client has paid his lawful charges. But if I owe my solicitor a bill of £30 for doing legal work for me ; and then I borrow from him £100, giving him as security for the loan the title-deeds of my house, he must return me the deeds when I repay the £100. He cannot keep them until I pay his bill of costs. Why not ? Because the deeds did not come into his hands in his character of solicitor, but in his character of lender.

I hope I have now made clear the proposition that no property can be retained by an agent for his charges as agent, unless such property comes into his hands as agent.

Lastly, take notice that this right of agent's lien is *only* a right to retain possession. It is not a right to sell property belonging to the principal, nor to mortgage, nor to use it. As I once heard it put most concisely, it is a right to

"sit upon" the goods. Thus, an agent who has bought goods for his principal on commission, can sit upon those goods till his commission is paid. But he must not pledge them or sell them and pay himself out of the proceeds. If my friend Spawtincard asks me to take his gun out of pawn for him, and I do so at the expense of £2, I can keep the gun until my friend has paid me what I paid the pawnbroker. Should I be so ill-advised as to use the weapon without Spawtincard's leave, he may bring an action against me for "converting the gun to my own use," and I shall have to pay heavily for my sport.

## SECTION II

### COMMERCIAL TRAVELLERS.

Real and apparent authority—Extent of authority—To warrant quality of goods—Selling on credit—Collecting accounts—Remuneration and expenses—Commission on all orders from customers introduced—Expenses—Dismissal and notice to quit—Termination of the business—Difference between traveller paid by salary and one paid by commission.

THE authority of a commercial traveller—that is, his power to bind his firm by his acts—depends upon the apparent authority of the traveller, rather than upon his actual authority. That is to say, the customer is justified in thinking that the knight of the road has the same powers that commercial travellers generally have, unless he has notice to the contrary.

**Extent of authority.**—The business of a traveller is to sell his principal's goods. Generally he sells by sample—occasionally he merely describes what he wishes to dispose of. The first thing to be said about this is that any statement made by the "commercial" as to the quality of the goods sold is binding upon his firm. Understand, please, I do not refer to mere puffing. I cannot imagine what would happen were all wholesale firms to be tied down to the absolute accuracy of their representatives' laudations of their wares. I heard a story told by a man in a train once, to this effect: "The first journey I ever made was in the South of England. I was travelling in leather belting, and the first man upon whom I called was a queer sort. When I went into his office and told him who I was and what I wanted, he said to me, 'Why should I give your firm an order?' 'Because,' I replied, 'we can supply you with a good article at a fair price.' 'You are the first traveller I ever saw,' quoth he, 'who did not say his firm's goods were the very best, and their prices the very lowest in the trade. You shall have an order, young man.' And I booked something considerable." But the extravagant eulogies commonly indulged in have no legal effect. Statements that do affect the principal are such as amount to "warranties" of the quality of the goods. For instance, when a commercial traveller states that his leather is "the best in the trade," that is only a puff. But if he says, "this is English make," and the stuff turns out to be made in Germany, his firm will be liable to an action for breach of warranty.

A further question as to the extent of the traveller's authority may be put in this form: "Has the traveller power to take orders on credit?" The answer



depends on the answers to one or two other questions. First, "Has the principal expressly told him that he may take such orders?" If so, the question requires no answering. If not, "Has the principal allowed him to do it before?" If he has, then the agent has implied authority to do it again. But, in other cases, the answer depends upon the custom of the trade. For instance, in the lithographic trade, I believe it is the custom to allow three months' credit to retailers. In that case, a traveller in lithography who took an order and agreed to allow the customer three months' credit would bind his firm. But if there were no such custom, and no previous dealings on the same terms, a traveller would have no right to accept an order except for cash on delivery.

Be careful, please, not to misunderstand me. If the three months' credit custom exists, and the traveller takes an order for 10,000 almanacks at 2s. per 100, at three months' credit, the customer can compel the firm to deliver the almanacks on credit, or pay damages for not doing so. If there is no such custom, the firm cannot be compelled to execute the order. But take care to observe that the firm cannot, in any case whatever, execute the order and then demand cash on delivery. They cannot, that is, send the customer the almanacks along with a note saying "Our traveller had no authority to give credit. Please pay cash to bearer." If they wish to take the benefit of the order, they must accept it as it was given, or not at all. They may, possibly, be entitled to say, "Our agent had no authority to accept an order on such terms, and we decline to execute it"; but they can never say, "You must take the things you ordered, but not on terms upon which you ordered them."

**Collecting accounts** is frequently part of a commercial traveller's duty. A customer who has no notice to the contrary is entitled to pay the traveller—a subject fully discussed on pages 517-18.

As to payment by cheque, a traveller has no authority to accept anything but cash, unless in previous dealings the principal has allowed him to take the customer's cheque. Another warning seems to be necessary in connection with cheques. Even when the principal has no objection to payment by cheque, the draft should always be made payable to the principal, never to the traveller himself. If a customer draws the cheque in the traveller's own name, and the traveller cashes it and decamps with the proceeds, the customer will have to pay again. It is also negligent on the customer's part to give the traveller a cheque payable to bearer—at all events, without crossing it.

**Remuneration and expenses.**—Travellers are paid either by salary or commission, and sometimes by both. The only serious question, as far as I know, ever raised in connection with a traveller's claim for commission is the familiar one of bad debts. I have frequently heard the point debated—though not in court—whether a traveller can claim commission on orders that produce bad debts. This very often depends upon the exact language of the contract between the knight of the road and his employer. When the agreement is, "The traveller to have 5 per cent. commission on all orders obtained by him," it may well be contended that the traveller has a right to his commission on each order immediately his principals receive it and raise no objection against the customer. But then there is the custom of trade to be considered, and in many classes of business it is customary

not to pay commission unless the customer pays for the goods. I strongly advise all commercial travellers and their masters who read this book to have a clear understanding on the point at the beginning.

When a traveller is not to be paid on bad debts, he is entitled to demand that his employer shall use the utmost diligence in collecting overdue accounts. A bad debt does not mean simply an unpaid debt, but one of which there is no reasonable probability of extracting payment—a debt owing by someone unable to pay.

A commercial traveller is entitled to be recouped all reasonable and necessary expenditure incurred about his master's business. Most houses pay their travellers a fixed sum per day. When no fixed sum is agreed upon, the traveller has only the right to charge his actual out-of-pocket expenses. Thus, he cannot charge first-class railway fare and travel third, nor put down, "Breakfast, 3s. 6d.," when he really paid eighteenpence.

It is very often a term of a traveller's employment that he shall have a commission on all orders sent by customers introduced by him, whether those orders are sent through him or direct to the firm. I want to point out that this commission will cease when the traveller leaves the employment of his firm, unless the agreement says otherwise. This is by the custom of trade. But with many other kinds of agents the case is different (*see Reid & Co.'s case*, p. 543).

**Dismissal and notice to quit.**—As a rule, a month's notice is sufficient on either side, except when the engagement is for a fixed time. There are some interesting cases as to the right of travellers engaged for a fixed period, when the business comes to an end before the engagement terminates. This is the kind of case I mean :—

Glibley is engaged as head traveller by Tomson & Co. for three years, at a salary of £400 and  $2\frac{1}{2}$  per cent. commission on orders. At the end of ten months Tomson & Co. either give up the business, sell it, or become bankrupt. Glibley has the right to be paid his full three years' salary (£1,200) and any commission already earned. But he is not entitled to a penny for prospective commission. In one of these cases an ingenious argument was made on behalf of the traveller. It was said : "If I sell a man all the apples from my apple tree, I have no right to cut down the tree, because it will prevent him from gathering the apples." But the learned judge pointed out the difference between selling apples and asking the man to try to sell them, and promising him a remuneration if he succeeded. The same principle was discussed in Rhodes's case (p. 514). Let me reiterate that salary is quite another matter. The traveller has a right to this for the full period of the engagement, but a deduction will be made, because the traveller has now the chance to get another engagement.



## SECTION III.

## BROKERS.

**Many different kinds—Definition—Bought and sold notes—Extent of authority—Must act personally—Not contract in own name—Not receive payment—Stockbrokers—The Stock Exchange—Differences between Stock Exchange and other brokers—Members of Stock Exchange are always personally responsible—Cannot revoke Stock Exchange broker's authority to pay—Liability for forged and stolen shares—Principal bound to reimburse Stock Exchange broker who is mulct by the rules of the Stock Exchange—Brokers on special markets.**

WHEN the small boy was told by his schoolmaster to write an essay on a familiar subject, he selected for his theme "Pudding." He wrote: "There are many different kinds of pudding—plum pudding, rice pudding" (here followed an appetising list), "and many others, and I like them all." Brokers, in one respect, resemble pudding: there are many different kinds of them. Like the ingenious essayist aforesaid, we must be content with enumerating the most common kinds. There are insurance-, ship-, bill-, stock-, and various kinds of produce brokers—*e.g.* those who deal in cotton on the Liverpool Cotton Market, those who confine themselves to corn, and those whose business it is to make contracts relating to wool. Anybody, in fact, may become a new kind of broker if he pleases.

**Definition.**—A broker is a man whose business it is to make contracts between other people. He is an agent pure and simple. Except on certain markets (*e.g.* the London Stock Exchange), he incurs no personal responsibility for the carrying out of the contracts he makes. He is always paid by commission. Unlike the mercantile agent (*see* section v.), he has not the possession of the goods that he sells.

**Extent of his authority.**—When a broker makes a contract for buying anything or selling anything, the usual practice is for him to make out two notes, called respectively the "bought note" and "sold note." Each of these notes is signed by the broker, who sends one to the buyer and the other to the seller. The following are specimens:—

**BOUGHT NOTE.** [*Sent to buyer.*]

Bought for Messrs. B. & H. of our principals, 200 tons of hemp.

W. S. & Co.

**SOLD NOTE.** [*Sent to seller.*]

Sold to our principals for Messrs. K. & F., 200 tons of hemp.

W. S. & Co

As I shall show you when I come to deal with the sale of goods, it is often necessary to have evidence of contracts of sale in writing, and signed by the parties or their agents. In this respect the broker is the agent of both parties. His signature on the bought note binds the seller; and his signature on the sold note binds the buyer. If he makes a signed entry in his books, that entry binds both buyer and seller.

A broker has also authority to *sell on credit*, unless there is a trade usage to the

contrary. Thus: on the London Stock Exchange it is the custom for the purchaser to pay the money, and the seller to hand over the stock sold, on the next settling day (p. 519).

A broker must always *act personally*. Thus: if I write to a Liverpool cotton broker, "Sell for me so much cotton," he must go on the Exchange and make the bargain himself. He cannot ask another broker to do it for him. To this rule there seems to be an exception in the case of "outside" brokers. An "outside" stockbroker is one who is not a member of the Stock Exchange; and it is necessary for him, therefore, to employ an "inside," or Stock Exchange, broker, to make all contracts on the Exchange.

A broker should *not contract in his own name*. I do not mean that he should always, in making his contracts, reveal the name of his principal. That would often damage the principal considerably. But if he does not name the principal, he should at least make it plain that he is acting as agent. "Bought for my principal," or "Sold for my principal" will be quite enough. And on the same grounds a broker cannot bring an action for breach of the contract in his own name.

*To receive payment* for the goods sold on his principal's behalf is *no* part of a broker's business. Therefore, if the buyer pays the broker, he does so at his own risk. I mean that if the broker should not hand over the money to his principal, the latter can make the buyer pay him over again. There is an exception in the case of stockbrokers on the London Stock Exchange, and possibly on one or two other special markets.

**Stockbrokers.**—Dealings on the S. E. (*i.e.* Stock Exchange) are so common, that it may be useful if I explain a little of that law relating to stockbrokers and their rights and liabilities in connection with their clients. First of all, let me say that everybody who employs a member of the Stock Exchange to do business for him there must be taken to know the rules of the Exchange, and to engage the broker to act in accordance with those rules. The most important rule affecting those who employ members of the Exchange is this:—All transactions on the Stock Exchange are between members; and the members making such contracts are personally bound to fulfil them. This rule makes the position of a Stock Exchange broker quite different from the position of an ordinary broker or other agent. Its effect is as follows:—P instructs A, a member of the S. E., to buy 100 Tom Tit shares at 10s. each. A enters into the contract of purchase with X, a jobber on the S. E. (p. 296). The shares go down in price, and on settling day there is a difference of £20 owing to the jobber. If it were not for the above-mentioned S. E. rule, P would be liable to X. A, being a mere agent, would have nothing to do with it. But by virtue of this rule X has nothing to do with P. He looks for his money to A, leaving A to settle with P. So that, instead of P paying X directly, as in other contracts, A pays X, and P pays A.

In an ordinary case, too, P could order A not to pay X the £20; and if A did pay after this, he would have no claim on P to be reimbursed. The rule of the S. E. quoted above again makes all the difference. A S. E. broker is bound to pay the jobber, whether his (the broker's) principal tells him to pay or not. A broker who declined to pay a jobber because of orders from his principal would



never do it again on the Stock Exchange, for that immaculate body would straightway turn him out. And as a principal is liable to indemnify his agent for all payments made lawfully on account of the business wherein that agent was employed, it follows that P must repay his broker what the latter was compelled to pay to X.

Other differences there are between S. E. brokers and brokers of the vulgar sort. By another rule of the S. E., a member who sells to another stock, etc., not what they purport to be—that is, forged, stolen, or invalid for want of stamping—must repay to the buyer the money he has paid for them, or else give him some genuine stock of the same kind and value. Suppose you instruct your broker to sell 100 Russian bonds, and he sold them to a jobber for £2,000, and the jobber afterwards discovered them to be forged bonds, your broker would be compelled either to refund the £2,000 or else to buy 100 Russian bonds—genuine ones this time—and give them to the jobber. If any dispute should arise on such a matter between two members, the Committee of the S. E. have power to decide it, and their decision is final.

Mr. Reynolds was an "outside" broker, who had £1,250 London & North Western Railway Stock to sell. Reynolds instructed Mr. Smith, a S. E. broker, to sell the stock, which Smith did in the usual way. The usual way is this: Smith (broker) goes to Gake (jobber) and says, "Make a price for London & North Western Preference." If Gake is willing to deal he names two figures, one the price at which he will buy, the other the price at which he will sell. Then for the first time Smith reveals whether he is a buyer or a seller, and he has the right, by the rules of the S. E. to compel Gake either to buy or sell (as the case may be) not more than £1,000 worth of British securities, 1,000 francs of French Rentes, and so on; so that in the case before us, Smith the broker went to two brokers, to the first of whom he sold £970 worth of the stock, and to the other the remaining £280 worth. The first jobber resold his shares to another broker, who acted for Sir C. Mills; and when the latter went to the London & North Western Railway office to register his name as a shareholder, he found that his shares were forgeries. Someone had stolen them from the real owner, forged the real owner's name, and sold them to Reynolds, from whom we trace them to Smith, the jobber, and Sir C. Mills. According to the rules of the S. E. application was made to the jobber to refund the money, and the S. E. Committee decided that he must pay it. Then the jobber applied to Smith, the broker, and the Committee also decided that Smith must refund the money he had received; which he did. But Smith had handed the amount to Reynolds, his principal, wherefore he applied to Reynolds. Reynolds refused to pay. He said: "I never told you to refund the money. Neither the rules of the Stock Exchange, nor the decisions of its Committee, bind me, for I am not a member. There was no liability to refund the money outside those rules and that decision, and I shall not recoup you." But Mr. Reynolds was mistaken. He was compelled by the High Court of Justice to repay Mr. Smith, on the ground that when you employ a member of a market to act for you on that market, you tacitly agree to be bound by the rules. To this there are only two limitations: (1) No one is bound

by an *illegal* rule. (2) When a rule is *unreasonable*, the employer is not bound by it unless it can be proved that he knew of it, and did not object. (See the case of Robinson, p. 330.)

It will easily be seen that this general principle applies to all markets. So that if you employ a Liverpool cotton broker, you must indemnify him so long as he acts by the rules of the Cotton Exchange; and a stockbroker, a member of a local Stock Exchange, is entitled to a like protection.

## SECTION IV.

### AUCTIONEERS.

**Sales**—"Without reserve"—Not bound to accept any bid—Extent of authority—Conditions of sale—Statements about the thing sold—Puffs—Bringing actions in his own name—To receive deposits and price—Not to sell on credit—Not to sell by private contract—Commission—Lien for commission and expenses—How far it extends.

AN auctioneer is an agent employed to sell goods or land at a public auction—a function so well known to my readers that I do not propose to define it. In general, when an auction is held there are certain rules laid down by the auctioneer, and certain conditions, called "conditions of sale," printed and distributed amongst, or read out to the people assembled. Anyone who makes a bid, makes it subject to these rules and conditions; and not only is the bidder bound by such rules and conditions, but the auctioneer and the auctioneer's principal are bound also. Sales by auction are sometimes advertised "without reserve," sometimes not. The difference is that when a sale is "without reserve," the auctioneer is bound to sell the thing put up to the highest bidder whose bid he accepts. For the knight of the hammer is not bound, in any case, whether the sale is "without reserve" or otherwise, to accept the bid of anybody who makes one. Thus, Nock, an auctioneer, advertises a sale of furniture "without reserve." A valuable old oak sideboard is offered. Solomon Isaacs, the dealer, says, "Ten pounds." "Ten pounds! Ten pounds! any advance on ten pounds?" cries Nock. This is accepting Solomon Isaacs' bid; and if no one else bids higher, Isaacs is entitled to the sideboard at the price named. But suppose the auctioneer declines to start the bidding at so low a figure, or refuses to have anything to do with Isaacs, because the credit of that worthy man is low, he (the auctioneer) need not take any notice of the bid. Why? Because a bid is only an offer of a contract, and no legal obligation arises until an offer is accepted. (See also p. 251.)

**Extent of authority.**—An auctioneer has pretty wide powers. Let us see what they are. If I instruct Nock, Downe & Co., auctioneers, to sell such-and-such things by auction for me, I give them authority to do the following acts:—

- (1) To make a catalogue and conditions of sale.
- (2) When the sale is in progress, to make statements about the article sold, so long as these things do not contradict the printed conditions and descriptions.



Thus, if I give Nock, Downe & Co. a water-colour picture to sell for me, which is described in the catalogue as "water-colour drawing, by Macdougall, R.A.," and the auctioneer describes it verbally from the rostrum as a "water-colour drawing by Turner," and someone buys it believing it to be a Turner, the deluded purchaser has no redress against me. He should have read the printed catalogue and conditions, and trusted to them. But if the picture is described in the catalogue as "water-colour drawing," and the enthusiastic auctioneer adds "by Turner" when the drawing is put up, a buyer who finds that it is only a daub by Knowboddy, R.A., can make me refund the money and take back my water-colour. The difference between the two cases is that in the first case, where the printed description and the verbal description were contradictory, the bidder must trust to the black and white. But in the second case the verbal description, "water-colour by Turner," was only supplementary of the printed catalogue. If an auctioneer employed by me misdescribes the things sold, or misrepresents their quality, and the purchasers come on me for damages, it is no defence for me to say, "I never authorised him to say these things." For the people in an auction room have a right to look upon the auctioneer as the mouthpiece of his principal—except when he contradicts the printed catalogue or conditions.

(3) The auctioneer is not bound to disclose the name of his principal, and he has the right to bring actions in his own name against all buyers who try to escape from their contracts.

(4) Again, as most of you know, one of the usual conditions of an auction sale is that the final bidder whose bid is accepted shall straightway pay to the auctioneer a deposit, and shall pay the full amount of the price before he takes the goods away. Any bidder who will not or cannot pay such deposit or price at the proper time, is guilty of breach of contract, and the auctioneer is at liberty, by the conditions of sale, to put the goods up again. If they realise more than at first, it is well. If they realise less, he comes upon the defaulting bidder for the difference. Thus, I bid £10 for a clock. "Going! going! gone!! Deposit, please, sir." "How much?" I ask. "One pound," is the answer. I fumble in my pocket, but cannot muster up twenty shillings. The auctioneer may offer the clock again. This time it is knocked down to Solomon Isaacs for £9 10s., and I shall have to pay the auctioneer ten shillings.

When the buyer of goods pays either deposit or full price to the auctioneer, he (the buyer) has done everything necessary, for to pay an auctioneer is as good as paying a principal—unlike a broker, who has no power to receive money on his employer's behalf (p. 553). It is different in the case of land. The auctioneer has authority to receive a deposit on the sale of land, but not to receive the full price. Therefore, if you buy land at an auction for (say) £500, you can pay the usual £50 deposit then and there to the auctioneer, but you must not pay him the balance.

Now for a few things **an auctioneer has no power** to do unless he is specially told to do them by his principal.

(1) He may not sell on credit, nor part with the goods without the cash. This was settled a century ago. An auctioneer named Williams was instructed to sell the household effects of a Mr. Crown, the sale being held at Crown's house. Now

Crown had borrowed £5 from a man named Millington, and had given him a receipt for it, but Millington had small hopes of seeing his cash again. So he attended the auction, and bid valiantly for goods until £7 2s. 6d. worth were knocked down to him. He paid Williams £2 2s. 6d. as a sort of deposit, and then began to carry his purchases outside and put them in a cart. Just as he was bearing away the last stick, Williams rushed after him, and demanded the balance, £5. "It is all right," said Millington, "I paid Mr. Crown, and here is his receipt." Saying which, he flourished the receipt in the auctioneer's face, jumped into his cart, and drove away. The auctioneer brought an action for the £5, and got it. Millington had no right, the judges held, to take away the goods without paying for them on the spot.

(2) An auctioneer has no right whatever, without his principal's consent, to sell by private contract. Such a sale is null and void; and not only is the hammerman liable to an action by the principal, but the principal can follow the goods into the hand of the buyer and reclaim them. Thus, I hand a horse to Swilkins to sell by auction. Instead of this he sells it to Muggins for £100—the beast being really worth about £20. I can, if I like, ratify and confirm the contract; but instead I can, if I like, follow the horse and demand that Muggins shall give it back to me, or else pay me its value. If he says, "Give me my £100 back, and I will gladly return the nag," I can reply, "Get your £100 out of Swilkins, if you can." I know auctioneers frequently do sell by private contract when they have no authority to do so, but the practice, though common, is illegal.

**Commission, etc.**—An auctioneer has a right to his commission on the proceeds of a sale, the amount depending upon his agreement with his principal. If there is no agreement, then whatever is customary and reasonable must be paid. Besides this, if the auctioneer does not sell your stuff for you, he is entitled to charge you a reasonable sum for his trouble—*e.g.* if I ask Jack Nock to sell a house for me, and he puts it up, but cannot sell it, he can charge me a reasonable fee for the trouble he has taken. And whether successful or not, I am bound to pay him the expenses of the sale—*e.g.* advertising—in addition to his fee or commission for conducting the sale.

**Lien for commission and expenses.**—A lien is described above (p. 547). An auctioneer can always refuse to part with goods entrusted to him for sale, unless and until he has been paid his expenses and commission or fee. The lien is called a "specific" or "particular," as distinguished from a "general" one. To take a common case. I send a lot of goods to Nock for sale by him, and he tries to sell them, but fails. I owe him £5 5s. for expenses and fee. A week afterwards I send him a second lot, and these again he fails to sell, so he charges me a guinea fee and two guineas for expenses of advertising, etc. Then I go to him and ask for my first lot of goods back, because I wish to take them to another auctioneer. Nock tells me that I am welcome to have them, provided I pay his bill—eight guineas. He is not entitled to this. I can claim lot number one on payment of the £5 5s. due in respect of the unsuccessful attempt to sell them. Nock has no right to lump the two transactions together, for that would be holding the first parcel of goods in pawn, as it were, for money owing in respect of the second.



## SECTION V.

## MERCANTILE AGENTS OR FACTORS.

**What is a Mercantile Agent?**—Modern name for factor—He deals with the goods themselves or the documents of title—What are "documents of title"?—Power and authority—As between himself and his principal—General lien—Acts as though he were principal—Power to receive payment—As between principal and outsiders—Sale or pledge of goods or documents valid though no authority from principal—Customary course of business as such agents—Pawnbrokers, beware!—Advantages of ignorance—When valuable consideration is necessary in Scotland.

THE term "Mercantile Agent" was first incorporated into British law by the Factors Act, 1889 (applicable to England and Ireland), the provisions of which were extended to Scotland by the Factors Act (Scotland), 1890. Before this Act, the agents whose functions I am about to describe were always called "factors"; and that is why this section is headed as you see it.

A factor, or mercantile agent, is an agent having in the customary course of his business as such agent, authority to sell or buy goods, or to raise money on the security of goods. The mercantile agent differs from the broker in almost every possible point. Thus, if you employ a mercantile agent to sell for you, you send the goods to him, or else the documents of title to the goods—you do not, as in the case of a broker, merely ask him to look out for a buyer. For instance, Jones is a cloth manufacturer in the West of England. He despatches to Smith, cloth merchant in London, 200 yards of broadcloth, with a letter, saying, "Sell this for me, on the usual 5 per cent. commission." Smith is a mercantile agent; for he has, in the ordinary course of his business as such agent, authority to sell the cloth. Take another case: Jonathan, of New York, consigns a cargo of tobacco by the good ship *Saucy Polly* to his agent, Sweet, of Bristol. The bill of lading is made out to "Jonathan or his order," and Jonathan indorses the bill of lading—*i.e.* writes his name on the back—and sends it over to Sweet, with instructions to deal with the cargo to the best advantage, for a commission or  $2\frac{1}{2}$  per cent. Sweet is Jonathan's mercantile agent, because he has, in the course of his business as agent, the possession of and power to deal with the "documents of title to the goods"—that is, the bill of lading. Bills of lading will be dealt with fully later; but it is necessary to say here that when goods are put on ship-board, a list is made of them, and this list is signed by the captain of the ship, who thus acknowledges the receipt of the goods, and engages to deliver them to the person mentioned in the bill of lading. Now, the captain has no right to hand over the goods except to the person who produces the bill of lading; and so the bill of lading becomes the "document of title" to these goods. Thus, if I ship a cargo of 1,000 tons of tobacco—"Deliver to the order of Mr. T. Scoops"—if you want to sell, or raise money on the security of that cargo, you can do it by selling or pledging the bill of lading. All the papers commonly used in trade as proof of the possession or control of goods are "documents of title." Such are dock-warrants, warehouse-keepers' certificates, delivery orders, and consignment notes.

The power and authority of a mercantile agent may be divided under two heads :—(1) His power and authority as between himself and his principal ; and (2) his power and authority as between his principal and the public.

(1)—*As between himself and his principal*, the authority, rights, duties and liabilities of a mercantile agent depend exactly on the same considerations as the authority, etc., of any other agent—namely, the agreement between himself and his principal, and the customs and usages of trade. He is bound to sell or buy for his principal to the best advantage. He cannot buy his principal's goods himself, nor sell his own goods to his principal, nor must he make any secret profit apart from his agreed commission. In one respect, however, by the usage of trade, a mercantile agent has an advantage over the broker and the auctioneer, for the mercantile agent has a **general lien** (*Scottish*, right of retention), while the broker and auctioneer have only a "particular" one. In plain English, the factor (mercantile agent) may refuse to part with the money, goods, or documents in his hands belonging to his principal until the principal has paid everything due to the factor, whether it relates to that particular lot of goods, etc., or not. For example, Paxton consigns a cargo of hemp to Stewart, of Dundee, his (Paxton's) agent, to be sold to the best advantage. Stewart pays the freight, the charges for unloading, etc., amounting to £40, and sells the hemp for £1,280 to Macfarlane, who gives him a cheque for £1,280. Stewart forwards this cheque straight to Paxton, without deducting the £40 expenses, or his commission, £35. Soon afterwards Paxton consigns another cargo in the same way, and Stewart again goes to the expense of £40 ; but this time there are no buyers, so Paxton orders Stewart to re-ship the hemp and send it to London. Now comes in Stewart's right of retention. He can refuse to part with the hemp unless and until Paxton pays what he owes on both transactions—£115. (Compare with Auctioneer's Lien, p. 557.)

But make not the mistake of supposing that Stewart can retain the hemp until every debt of every kind owing to him by Paxton is satisfied. This is not so. He can only retain the goods until all his agency charges are paid. If Paxton owes him other sums—*e.g.* for money lent, or for goods sold by Stewart to Paxton—Stewart cannot retain the hemp as against these. (*See also* p. 548.)

In the second place, a mercantile agent has the right, unless forbidden to do so by his principal, **to act as though he were the principal**. Thus, if I send you the bills of lading for a cargo of rice, and ask you to sell the rice for me on commission, you may make contracts for such sales in your own name, without even disclosing your principal's name at all. (Compare *Brokers*, p. 553.) He has also power to **receive payment**, but he must not take a bill of exchange, unless you give him special authority to do so.

(2)—*As between the principal and outsiders*, the authority and power of a mercantile agent differ vastly from the power and authority of any other kind of agent. This state of things has been brought about, in the main, by the Factors Acts above referred to. Before these Acts, it was in England, and to some extent in Scotland, unsafe to deal freely with a mercantile agent or factor. For instance, A consigned cloth to B, a cloth agent, to sell on



commission. B exhibits the cloth in his warehouse, and it is, to all appearances, his own. On Monday B receives a letter from A, cancelling his authority as agent. On Tuesday B sells the cloth to C. Before the Factors Act C would have been liable to pay the value of the cloth to A, though he had already paid B, and paid him believing that he had authority to sell and to receive the price.

Again, A sends the bill of lading of a cargo of wheat to B, a mercantile agent in Bristol, saying, "Raise £1,000 on the security of this bill of lading with the Bristol and County Bank." A intends B to pledge the bill of lading with the bank as security for an advance of £1,000; but instead of obeying instructions, B sells the bill of lading outright to X for £1,200. Before the Factors Act, X would have had no title (probably) to the bill of lading and would have been obliged to give it back to A. Of course, X might have got back his £1,200 out of B, and damages, for pretending that he had authority when he had not; but that was quite another matter.

The Factors Act was passed in order to remedy this state of things, and to promote confidence in dealing with mercantile agents. It enacts that when a mercantile agent is in possession of goods [or documents of title to goods, p. 558] with the consent of the owner, and he sells or pledges or otherwise disposes of these goods [or documents], the person to whom he sells or pledges shall have the same rights as though the mercantile agent had authority to sell or pledge.

*E.g.*—I send a cargo of earthenware to my Aberdeen agent to dispose of. My instructions to him are to wait till the cargo arrives, and then sell. But he does not wait. As soon as he receives the bill of lading, off he goes to his bank, and pledges the document for an advance of £200. The bank have a right to hold the bill of lading against all comers until their loan is repaid.

Next, I send a piano to you, a piano dealer, to sell. Afterwards I have a good offer for it, and agree to sell it to Smith, and I telegraph, "Don't sell piano." Notwithstanding this, you do sell it to Jones. The sale to Jones is good, unless he knew that your authority was revoked.

But you must be careful to notice that the Act only applies to "mercantile agents having, in the customary course of *business as such agent*, authority either to sell or pledge, etc." In a case of Hastings and Pearson, two judges held that this only applied to a man who carried on the regular, recognised business of a mercantile agent. Hastings, Limited, were a Company, carrying on business as jewellers. They had in their employ one Brooke, whose business was to call at private houses and sell watches and trinkets. Brooke was paid £1 10s. a week, and 5 per cent. commission on cash transactions; and it was his business to account to Hastings, Limited, every week. Brooke had no authority to pawn the watches and jewellery entrusted to him; but he broke faith with his employers, and pledged several articles with one Pearson, a pawnbroker. Hastings, Limited, demanded the return of these goods without being called upon to repay the amount advanced on them. Pearson objected that Brooke was a "mercantile agent," in possession of goods with his employers' consent; and therefore that he

(Pearson), having acted *bonâ fide*, was protected by the Factors Act. But that great commercial judge, Mr. Justice Mathew, deemed otherwise. "It is plain," remarked his lordship, "that the Act applies only to persons of the class ordinarily carrying on the business of mercantile agents, and that it has no reference to a man in such a position as Brooke was. There is no such business as that of an agent to pledge with pawnbrokers small articles of jewellery for the purpose of raising money for the employer of the agent."

In connection with mercantile agents, trouble most frequently arises when the agent sells or pledges goods for his own purposes, and not in the interests of his employer; and also when he sells his employer's goods to someone to whom he (the factor) owes a debt. In such cases the rights of the employer vary, according as the third party knew, or did not know, that the goods were not the personal property of the agent; and according as the transaction is a sale, a pledge, or an exchange. A few illustrations will make this clear.

(1) M A is a mercantile agent of P L, having in his possession £50 worth of crockery consigned by P L for sale on commission. M A owes £30 to X Y. M A deposits P L's goods with X Y as a pledge to secure the payment of the old £30 debt.

X Y must return the goods to P L; for the pledge by the agent in consideration of an old debt is not valid as against his principal. But if P L owed M A anything in respect of the goods—*e.g.* commission, or expenses—he must pay this to X Y before the latter is obliged to give up the goods. The reason is that X Y is entitled to everything that M A was entitled to, but to no more.

(2) M A is a mercantile agent of P L and has in hand the bills of lading of a cargo of marble. He sells the bills of lading (*i.e.* the cargo) to X Y for £800. At the time, M A was in debt to X Y to the tune of £300 on his own personal account. X Y can deduct the £300 from the £800, if he did not know the cargo to be P L's. See the advantages of ignorance!

(3) M A is a mercantile agent of P L; and has in hand the consignment note of a quantity of bar-steel. He meets X Y on the market and strikes a bargain that he (M A) will exchange the bar-steel for a quantity of pig-iron belonging to X Y. They accordingly exchange consignment notes. The bar-steel is worth £1,000, the pig-iron worth only £500. P L has the right to get back his steel on paying to X Y the real value of his pig-iron; because the agent had no authority to exchange in the way stated, and if X Y gets the real value of his iron he loses nothing.

Lastly, if a mercantile agent gives away his principal's goods (or documents of title), the principal has always the right to get them or their value back from the person who has received them. As I told you (p. 276), valuable consideration is not usually necessary for a valid agreement in Scotland; but in this case it is. The law is the same all over the United Kingdom, namely, that a sale, pledge, or other disposition of goods by a mercantile agent is not binding on his principal in any circumstances, unless such sale, pledge, or disposition was for valuable consideration. (Valuable consideration defined, p. 277).

In conclusion (one is always privileged to have an "in conclusion" after a "lastly"), if a factor or mercantile agent, acting outside his actual authority, makes



a sale or pledge to a person who knows that the agent is acting wrongfully, the sale or pledge has no strength or validity whatever. Thus, I consign a cargo of rice and the bills of lading to M A, my mercantile agent at Dundee. I tell him—"Sell outright," but instead of this he pawns the bills of lading to Macpherson. Macpherson knew I had instructed M A to sell outright. Macpherson must return the bills of lading to me, and look to M A personally for the repayment of his loan.

## SECTION VI.

### AGENTS FOR FOREIGNERS.

Agents for foreigners are entirely different from ordinary agents—Are personally liable—Principal not personally liable—Can pledge his own but not his principal's credit—*Del credere*, or guaranteeing principal against loss.

**Agents for foreigners** occupy a position entirely different from other agents. As I have previously stated, A (the agent) makes a contract on behalf of P (his principal) with X. As soon as the contract is made, A drops out, leaving P and X face to face. X can only sue P on the contract and P can only sue X. A has neither rights nor liabilities—except his right to his commission and his liability to P if he has been negligent in performing the duties of the agency. A has authority to bind P and to pledge P's credit in the transaction.

Now, when the principal is a foreigner (I mean by residence, not necessarily by nationality—*i.e.* an Englishman resident in France is a foreigner in this sense), the agent here has no right to pledge his credit. *The agent himself is personally liable*, not his foreign principal. This doctrine is founded on principles of commercial convenience. Brother Jonathan grows cotton in Carolina, U.S.A., and consigns it to the New Orleans representative of J. Bull & Co., commission agents, of Liverpool, in order that the raw material may be consigned to England and there sold. Bull & Co.'s representative in New Orleans sends the cotton to his Liverpool house, who sell it to Arkwright, the cotton-spinner. Suppose the cotton turns out to be inferior to sample, how excessively inconvenient it would be if Arkwright had to sue Brother Jonathan, of Carolina, U.S.A. ! Yet such would be the law if the ordinary rules of agency applied. For Bull & Co. are, after all, only Jonathan's agents, selling for him on commission, and accountable to him for the proceeds.

But the situation would be such that foreign trade would be ruined ; and so by the usage of traders themselves, now thoroughly incorporated into the law of Great Britain, an agent for a foreigner pledges not his principal's credit, but his own.

Still, if the parties themselves choose to do so, **they can alter this liability** in their own particular case. It is quite open for Bull & Co., when they sell the cotton to Arkwright, to say, "We are acting as agents for Jonathan, of Carolina, and we undertake no personal responsibility." Should Arkwright agree to this, well and good. If not, then he need not buy. Here is an instance:—Mr. Kopke was the English agent of Leonard Roos of Gothenburg, and he sold to

Mr. Green a quantity of tar. The sold note ran : "Sold on behalf of Mr. Leonard Roos, Gothenburg, about 1,000 barrels of good Swedish tar, at 23s. per barrel, etc. etc.," and was signed "H. Kopke, *as agent*." The court decided that Kopke was not personally liable, though his principal was : foreigner, seeing that he had expressly signed "as agent," and had made the contract expressly "on behalf of Mr. Leonard Roos, Gothenburg."

Practically, it amounts to this : If you are the agent of a foreigner, you are personally liable, as though you had been acting for yourself, unless you make it clear that you do not intend to bind yourself.

To speak vulgarly, what is sauce for the goose is sauce for the gander. In other words, the rule cuts both ways. For since the agent for the foreigner is personally liable if his end of the contract is not properly kept up, so also the customer is liable to the agent if he (the customer) does not carry out his share. To take the instance given above : If the cotton supplied by Bull & Co. as agents for Jonathan is inferior to sample, Arkwright can demand compensation from Bull & Co. So also, if Arkwright refuses to take the cotton he has ordered, Bull & Co. can sue him for damages. Put shortly, the rule is that a British agent for a foreigner contracts all through as though he were principal, not agent.

**Guaranteeing principal against loss. *Del credere*.**—Sometimes an agent contracts with his principal that he (the agent) will guarantee payment by the customer. Thus, Prince, of New York, consigns cotton to M'Queen, of Liverpool, to be sold on commission. In the ordinary case, if M'Queen sells to Jones, and Jones fails to pay, the loss falls on Prince. But foreign principals frequently give their agents what is called a *del credere* commission. For instance, the ordinary agent's commission on the sale of cotton being 5 per cent., Prince writes to M'Queen, "I will give you a *del credere* commission of 6 per cent." This simply means that M'Queen is to be responsible for the price if Jones fails to pay for the cotton. The words *del credere* are from the Italian, and have the same meaning as our word "guaranty." Therefore, though Jones is liable in the first place, yet if he does not pay at the proper time, M'Queen is bound to make up the sum.

It is, of course, quite possible for an agent to undertake this kind of responsibility for a home principal, but it is most usual in the case of home agents and foreign principals, or home principals and foreign agents.



## CHAPTER IV.

### PARTNERS AND PARTNERSHIP.

**Definition**—Distinguished from clubs—How to become a partner—A warning—**Liability** to public—"Holding out"—Liability of retiring partner—How retiring partner may escape liability—Liability of new partners—All partners must consent to admit a new partner—People who are not partners though they share profits—Sharing profits by way of interest on loan—risks—Length of a partnership—Dissolution clauses—Compulsory dissolution—Dissolution by death or bankruptcy—Partners unable to agree—Consequences of dissolving partnership—How a business must be wound up—Premiums—Duties of partners—To attend to business—To avoid conflicting interests—Fidelity—Copying customers' names for purposes of competition—All profits belong to the firm—No secret profits to one partner—Rights of the majority—Majority cannot expel minority—Keeping accounts—Right to examine books—Profits and losses—Capital—Loans—Interest—What is partnership property—Goodwill—What is it?—Retiring partner setting up in rivalry—Practical advice—Transfer of a partner's share—Right of partners to bind the firm—Every partner is the firm's agent within usual scope of business—Implied powers of partners—Wrongful acts, frauds, and breaches of trust—How far the firm is liable for one partner's wrong—Continuing guaranty cancelled by change in firm—Individual liability of partners for firm's debts, etc.—Liability of firm for partner's private debts, etc.

**What is a partnership?** The Partnership Act, 1890, declares partnership to be "the relation which subsists between persons carrying on a business in common with a view of profit," but excluding companies formed under the Companies Acts, companies or associations formed under Royal charter, or letters patent, or Act of Parliament, and mining companies within the Stannaries jurisdiction (Cornwall and parts of Devon). You should note the words "business" and "profit." I will tell you why. People very often are puzzled as to whom to sue in such cases as this:—Fifty young men form a football club, calling it (say) the Shinkik Rangers. The secretary, acting on instructions from the committee, hires a field for the season, gives orders for printing fixture-cards, and runs up bills for footballs, goal-posts, and the other paraphernalia of the sport. But the "gates" are small, and subscriptions do not come in rapidly; wherefore the worthy secretary finds himself with no funds in hand wherewith to pay the rent of the field. He declines to pay out of his own pocket. What is the landlord to do? He cannot take action against the club, because the club, as such, has no legal existence. I have heard of cases in County Courts, where no professional advice has been taken, in which football clubs and associations of the same kind have been sued, under the impression that they were partnerships. The impression is a wrong one; because the club is not a "business," nor is it carried on with a view of profit—its object being simply amusement and sport. The proper course for the landlord of

the field to take is to sue the individual members of the club, every one of whom is liable for the whole amount of the debt. If he (the landlord) brings his action against (say) six of the members, they in their turn have the right to recover a share from each of the other members. Thus, if the club consists of fifty members, and the rent of the field is £10, and the landlord brings an action against Smith, Macdonald, Brown, O'Brien, Trevelyan, and Evans; they six, having to pay the £10 amongst them, may compel the other forty-four members to pay 4s. each by way of contribution.

**Proprietary Clubs.**—The principle illustrated in the last paragraph applies to clubs of every sort, whether for sport or for social or political purposes, except proprietary clubs. An ordinary club is one carried on by the members, without any object of profit. For instance, someone starts a Liberal Constitutional Club at Sundown-by-Sea. He summons a meeting of men interested in the cause, convinces them of the advantages to be gained by having a place where members of the party can meet; and they resolve to form a club. A building is hired, members are elected, and subscriptions are paid. Dinners, luncheons, etc., are provided at the club-house; and any balance that may be in hand at the end of the year is used for the benefit of the club—to buy a new billiard-table, to re-furnish the smoke-room, and so on.

A proprietary club is a very different thing. In this case the society is organised by one or more speculators, who put in their own pockets any profits made after paying expenses. The relative advantages and disadvantages of the two systems are, that in the ordinary club everything belongs to the members, while in the proprietary everything is the property of the speculators aforesaid. On the other hand, a member of an ordinary club is liable to contribute to any deficit there may be, even though he has paid his subscription, while a member of the proprietary establishment incurs no liability beyond his subscription.

**How a man becomes a partner.**—Partnership is a matter of agreement; and a man becomes a partner in any business simply by an agreement that he shall become one. No particular formalities are required for the purpose. No words, even, are required. For, as I said in the chapter on contracts (p. 251), an agreement may be made by conduct quite as well as by the written or spoken word. If two men, without saying a word on the subject, "carry on a business in common with a view to profit," they are just as much partners as though they had signed and sealed a document half a yard long. It very rarely happens that one comes across a partnership entered into by conduct alone, but it does happen sometimes.

When old Crossmyloof, the grocer, shuffles off his mortal coil, leaving behind him a flourishing business and a will, by which he bequeaths the stock-in-trade and goodwill to his sons John and Tom, and the lads simply go on with the business and share the profits every quarter, John and Tom become partners.

**A warning,** however, is necessary. Partnership, like matrimony, is easy to commit, but—another close resemblance between the two relationships—it is apt to end in disaster if it be not carefully considered beforehand. I do not refer to such points as entering into a business which you do not understand,



or becoming the partner of a man with whom you are bound to quarrel before long, or choosing a partner unblest with any business capacity, or anything of that kind. I allude to the common practice of entering into partnership without a proper agreement. There are scores of firms constituted every year by a mere verbal agreement, or the scantiest of written contracts after this wise :—

We, the undersigned, agree to become partners in the business of electricians. John Jones is to bring into the firm his electric lighting patent No. 12706 of 1896, and Thomas Smith shall bring in £500 capital.

J. JONES.  
T. SMITH.

Upon the faith of an agreement like this, Jones and Smith hire premises and begin business. Little do they reckon of the trouble in store. They have not provided for half-a-dozen things of the most vital importance. They have not made any agreement as to what is to become of the business if one partner dies, or becomes a lunatic or a bankrupt. There is no provision to meet the emergency of dissolution of partnership in case of disagreement, or in case either of them wishes to retire. These and other contingencies ought always to be provided for in the very smallest of partnerships. And there is only one way to do it, which is to go to a solicitor and have articles of partnership drawn up in proper form. Take my word for it, you will regret it if you do not follow my advice ; and the more prosperous the business is, the more sorry you will be. Not only will a solicitor tell you those clauses which ought to be inserted in every partnership agreement, but he will put into shape any special terms you may wish to make.

**Liability to the public** stands on a very different footing from liability to one's co-partner. If I carry on business in common with you, your liability to me and my liability to you depend on the agreement between ourselves. But the liability of the firm for my acts or your acts depends on entirely different considerations. I, for instance, may have no power to draw cheques on the firm's banking account ; nevertheless, if I draw a cheque in the firm's name and pay it away to Robinson, that gentleman will have a perfect right to enforce payment of the cheque, provided that he was unaware of the agreement between you and me.

This is because, as between the firm and outsiders, the firm's liability depends on the law of Agency, as I shall presently show.

Let me here point out that if you allow Smith, who is not your partner, to pretend that he is, you will be liable for his acts and omissions just as though he were your partner. And Smith, by representing himself to be your partner, will become liable to the world for the partnership debts. This is what is called **"holding out" a man as a partner**. I have explained how you may "hold out" a man as your agent (p. 516). Holding out as a partner rests on exactly the same principle—namely, the principle that if I in any way represent a fact to be true, and you act upon the faith of my representation, I am not allowed to deny the truth of my own statement.

A man may be held out as a partner in any number of ways. Words, conduct,

and sometimes mere silence may constitute a "holding out." But the silence must be of the kind that gives consent ; as where Smith allows Jones, in his hearing, to speak of him as "my partner" and does not dissent. As a rule, a man who makes a misrepresentation is only liable to the person to whom he makes it. Thus, if Scott says to Dickson, "The Bottomless Pit Mining Company is a very good investment. I know that a large profit has been made this year," knowing very well that the Company has lost heavily ; and Dickson repeats this to Thompson, who buys shares in the Company on the faith of it, Scott is not liable to Thompson. But in the case of "holding out" as a partner the case is different. If Gray says to White, "I am a partner in the firm of Green & Co., merchants," and White repeats this to Black ; if Black trusts Green & Co. because he thinks that Gray is a partner, Gray is liable for the debt. The reason, apparently, is that Gray ought to know how these things are talked about in commercial circles. He ought to be aware that if he proclaims himself to be a partner, the fact is almost certain to be repeated to other traders. In connection with this subject, let us consider

**The liability of retiring partners.**—Jones, Brown and Robinson carry on business as Jones & Co. At the end of 1896 Brown retires from the concern. He is, of course, liable for all the debts of the firm contracted up to the date of his retirement. If he be not careful he may continue liable even after he has retired. For instance, Smith has been in the habit of selling goods to Jones & Co. on credit. Smith knew who the partners were. In 1897, after Brown's withdrawal, more goods are ordered by Jones & Co. from Smith, the price amounting to £500. Then the firm of Jones & Co. becomes insolvent, and Smith claims his £500 from Brown. Brown declines to pay ; but he will be compelled to do so unless Smith had notice of his retirement from the firm. The reason is obvious. Smith gave credit in 1897 to Jones & Co., believing the firm to consist of Jones, Brown and Robinson. He was allowed to continue in that belief by Brown, and Brown is therefore liable on the ground of "holding out." If Smith had never known that Brown was a member of Jones & Co., the case would have been different, because Smith would not then be able to say that he gave credit to the firm under the belief that Brown was a member.

The practical moral is that on retiring from a partnership you should take care that every one of your old customers, creditors, and correspondents receives a circular announcing the fact of your retirement. You should also advertise in the *London Gazette* (English firm), *Edinburgh Gazette* (Scottish firm), or *Dublin Gazette* (Irish firm). This gives notice of your retirement to all persons with whom you have not dealt before.

The doctrine of "holding out" does not apply when a partner dies, and the business continues to be carried on under the old name. To illustrate the point :—Green and Field carry on business under the name of Green, Field & Co. In the course of nature Green dies, and Field keeps the business going without altering the name over the door. Green's executors are not liable for the debts of the business, and it does not matter in the least whether notice is given to creditors of the firm or not.

I said at the beginning of this sub-section that a retiring partner is, of course,



liable for all debts contracted up to his retirement. By this I meant to convey to you that merely by retiring from the firm, Brown cannot get rid of his liabilities for the debts of Jones, Brown and Robinson. But it is quite **possible for a retiring partner to be discharged from his liabilities** to the firm's creditors. The question is, How? Well, by the creditors consenting to accept the new firm instead of the old as their debtor. Not otherwise; for it would never do to let one of two people who owed you money agree with the other that he should cease to owe it to you, without consulting you at all. The truth is that there must be two agreements: one between the retiring and continuing partners, by which the continuing partners agree to take the full burden on their own shoulders; the second between the (continuing and retiring) partners on one side and the creditor on the other, by which the creditor agrees to accept the promise of the continuing partners in place of the promise of them all.

The cases on this point are easy to decide when an actual (or express) agreement is made—for instance, Jones, Brown and Robinson owe Macbeth £100. Jones agrees to retire from the firm. Brown and Robinson write or speak to Macbeth, saying, "Jones is about to retire from the firm; will you carry over your account to us? We intend to trade as Jones & Co." If Macbeth agrees, Brown is released; if not, not.

It is, however, an event of the rarest occurrence to have such a straightforward state of things as that described in the last paragraph. You generally have to decide the question by the conduct, rather than the words, of the people concerned. You are usually asked to say whether the creditor has or has not, by his conduct, discharged the retiring partner and consented to accept the responsibility of the remaining co-partners. Take this case, for example:—Percival & Co. owed money on a bond to Heath. "Co." retired from the firm; and Percival continued the business, and advertised that all creditors of the firm should either come in and get paid at once, or else look for payment to Percival only. Heath turned up with his bond; but did not demand to be paid off. He was quite content to accept his interest from Percival. Later, Heath sued the "Co." for his bond money; and "Co." had to pay. "Co." said, "By his conduct Heath accepted Percival as his creditor, and discharged me." The answer was, "I certainly said I was quite willing for Percival to pay me; but I never agreed to forego my claim on you if Percival did not pay."

Now turn the tapestry. G and D were partners in trade. To one Evans they owed money, and they gave him a joint bill of exchange, payable in three months. Before the end of the three months, G and D dissolved partnership, D clearing out, and leaving the business and the liabilities to G. Evans knew of the dissolution, and at the end of the three months he turned up with his bill. It happened to be inconvenient for G to pay just then, so he got Evans to renew the bill—*i.e.* to take another one instead. The renewal bill was only signed by G. This, again, was not paid when due; and then Evans turned to D, and asked him for payment. But D fought the case, and successfully; for Lord Kenyon held that Evans, by taking G's bill instead of G's and D's, had consented to accept G as his sole creditor.

That is the point. Has the creditor consented to accept the continuing

partner as his *sole* debtor? In other words, has he, by his words or conduct shown that he intended to regard the continuing partner as his debtor, and to let the retiring partner go free? If you do not find both these elements, the retiring partner is not discharged.

Let me add that when a new partner comes in instead of the old one, and the creditor, knowing of this, allows the new firm (say) to pay interest on the old debt, the presumption is strong in favour of the contention that the creditor has consented to discharge the retiring partner. It is much stronger than when a partner merely retires. Why? Because if A, B and C are all liable to you for the sum of £50, it requires some argument to persuade me that you will let A go, simply accepting the liability of B and C. But if when A retires, D comes in, it is quite reasonable that I should accept the promise of B, C and D in place of that of B, C and A. But remember, in all cases this depends on the creditor—not on the partners.

**New partners.**—It is a fundamental axiom of partnership law that no new partner can be admitted without the consent of all the old ones. I should hardly take the trouble to spend ink and paper to write down this axiom if I were not aware of the necessity of emphasising it. It is within my own personal experience that men of business think otherwise; for more than once I have been consulted upon the three following points: (1) Smith, the senior partner in Smith, Jones and Brown, wishes to retire. He has a son whom he would like to instal in his place. On broaching the subject to Jones and Brown, he finds that his proposal is not received with enthusiasm; whereupon old Smith tries to carry his point with the strong hand. "A pretty state of things!" quoth he, "if I cannot give my share to my son! The business is as much mine as yours." (2) Smith, the senior partner in Smith, Jones and Brown, desires to introduce his son Thomas into the business as a partner. Smith, senior, has a half share of the partnership business, the other half being divided equally between Jones and Brown. Smith proposes to give Thomas half of his half—thus making it Smith, Jones, Brown and Smith, each partner being equally interested. Jones and Brown object, or, if you like, Jones, like Barkis, "is willin'," but Brown objects. There may be no reason for the objection; it may be simply the kind of thing done by obstructive members of the House of Commons, who sit in the House after midnight and call out, "I object," whenever the clerk at the table reads out the title of a bill. (3) When Smith dies, a clause in his will says, "I leave my share in the business of Smith, Jones and Brown to my son Thomas." Jones or Brown, or both of them, refuse to receive Thomas into the firm.

In all three of the cases just set down, the objection holds good. Smith cannot force his son into the firm in the face of opposition from either of the other partners. I have known more than one old man of business who has thought otherwise and has had to be convinced of the contrary by counsel's opinion.

To this sub-section there is a practical moral. Very frequently a man enters into business alone, and in course of time finds himself constrained to take a partner, merely by the fact that the business is growing too big for one pair of hands to manage. His eldest son is not old enough to be taken in; so the worthy man gives or sells a small share in the business to his manager, or someone



of that sort. By and by the son attains years of discretion, and his father announces that he (the son) is to be received into partnership. Then the junior partner steps in and forbids the banns, and paterfamilias, on consulting his solicitor, finds that he cannot carry out his paternal intentions. Let me advise anyone who admits a junior partner into his business in such circumstances as above described to insist upon a clause in the partnership articles giving him the power to take in other partners, and the further power to appoint a partner to succeed him upon his death or retirement. A clause of this kind would have saved much friction in more than one case that I have known ; but it is more often omitted than inserted.

**The liability of new partners.**—By “new partners” I mean persons admitted into an existing firm. A new partner is in no way liable to creditors of the firm for debts contracted before he became a partner. This looks fairly obvious ; but it is worth taking a note of, because I have known it questioned by the laity. Green and White take Black into partnership on the 1st of December, 1896. At the time, Green and White owe certain debts, including one of £200 to Macwhumple. By the articles of partnership, Black agrees with Green and White to bear his share of all debts due by the old firm, setting against it the debts due to the old firm. Notwithstanding this agreement between White, Green and Black, Macwhumple has no claim against Black for the £200 or any part of it. The reason is plain. Just as no agreement between Green, White and Black could diminish the rights of Macwhumple, so also the said Macwhumple can take no rights under such an agreement ; for the rule of law is that the only people who can have legal rights under a contract are people who make the contract. The consequence is that Macwhumple must be content with his remedy against White and Green, who constituted the firm when the debt was incurred. They two must settle with Black, if that gentleman has agreed to bear part of the burden.

Now let us take the case of a change in a firm caused by the retirement of one partner and the admission of another. Brown, Jones and Smith trade under the name of Brown & Co. in the business of tailors. One of the people from whom they have been in the habit of buying cloth is Parkins, of Bradford. On the 1st of January, 1897, Jones retires from business and Robinson takes his place, the old name being still retained. No notice is sent to Parkins of the change of the *personnel* of the firm ; but on the 2nd of January an order is given to him for more cloth. After the order is executed, Parkins finds out that Jones has gone out of, and Robinson has come into, Brown & Co. Parkins may now take his choice as to whom he will hold liable for the price of the goods. He may hold Brown, Jones and Smith liable, because they are the three whom he thought to be partners. Or he may come upon Brown, Robinson and Smith, because they are the people who, in fact, ordered the goods from him. But he cannot make the whole four of them liable. If he goes for Jones, he must leave out Robinson, and *vice versa*.

**People who are not partners.**—At one time there was a great deal of confusion with regard to what constituted partnership. Some people thought that everybody who shared in the profits of a business were partners. Others

did not go quite so far as this, but laid it down as a rule that all who shared profits and losses were partners in the business. Let us see, in the light of the Partnership Act, how far these views are correct at the present time. In the first place, if A and B are joint-owners of a certain thing, each entitled to half the profits, they are not necessarily partners, even though they are to share expenses and profits. For instance, A and B are joint-owners of a house which is out of repair. They agree that A shall find money to put the place in a tenable state and shall then let it. The expenses of repair and the profits from the rental are to be divided equally between the two owners. A goes to C, a builder, and contracts with him to put the house in repair for £50. C performs the contract, is unable to get his money, and brings an action against A and B's defence is, "I was no party to the contract," to which C replies, "You are in partnership with A with respect to this house, and therefore you are bound by his act." B is right and C is wrong. There is no partnership, because there is no business. It cannot be said, without straining words to a most unnatural extent that the co-owners of a house "carry on a business" by letting their property and receiving the rent. The same was decided in the case of two sporting gentlemen who owned a race-horse between them, and who had agreed to share the expenses of its training, entrance fees for races, etc., and to divide such prizes as it might win. This was held not to be a partnership.

On the other hand, a Scottish judge decided that the proprietors of *The Times* newspaper were partners in that great undertaking. The question arose in connection with the celebrated articles on "Parnellism and Crime"—articles which caused the appointment of the Parnell Commission and more than one action in the Courts. Amongst other proceedings, Mr. Parnell brought a libel action in the Scottish Courts against his defamers. He included in his action every one of the persons who owned a share in *The Times*, who numbered over 100. A great many of these ladies and gentlemen strongly objected to being hauled into the affair—an objection natural enough when one considers that the real control of the paper was in the hands of Mr. Walter, the chief proprietor, who was admitted to be responsible for the alleged libels. Mr. Walter's co-proprietors set up the defence that they were merely co-owners and not partners; but Lord Kinnear decided that they were partners, because they carried on a business in common with a view of profit.

I allude to these cases in order to show you that although co-ownership does not necessarily make the co-owners partners, yet when the thing owned is really a business, the co-owners will be partners, though some of them take no active part in managing the concern.

The sharing of the profits of a business does not *of itself* make you a partner. Note the words in italics. For although sharing the profits of a business will not, without something more, make you a partner in that business, yet an agreement to receive such a share of profits goes a long way towards making you a partner. Let us consider a few cases.

(a) Smith and Robinson are engaged in business, or are about to engage in business, and they feel that they could do great things had they another



£500 capital. So they come to you for the purpose of borrowing it, and you lend it to them upon condition of receiving, by way of interest, one-fifth of the profits made by Smith and Robinson. Take care to have such an agreement in writing. Take care, also, that the writing is signed by Smith, Robinson, and yourself, or by someone on your behalf. If the contract is in writing, the affair is only a loan; but if not written and signed, in my opinion you become liable as a partner for all the debts of the firm of Smith and Robinson. [Partnership Act, 1890, section 2 (3) (d)].

An agreement of this kind had better be drawn up by a solicitor, for it must be in writing, and is a very ticklish matter; and unless you are very careful you will be landed with all the liabilities of a partner. This has happened in several cases. Blank & Co. carried on the business of manufacturers. Driver lent money to them under a written agreement by which the firm was to pay him a proportion of profits by way of interest. Blank & Co. also agreed that Driver should have the right to inspect their partnership deed and their books; that if the partnership were dissolved, accounts should be settled between them, and the loan should be repaid out of the partnership assets. There was also an arbitration clause, and Blank & Co. agreed to carry on their business according to their deed of partnership. Blank & Co. failed, and one of the creditors took action against Driver, on the ground that he was a partner. What is more, the Court of Chancery decided that he was a partner, and that his "loan" was only a dodge to secure himself against partnership liability. No doubt Driver thought himself quite safe, for the agreement expressly said that he was not to be considered as a partner. The judges, however, looked at the agreement as a whole, and came to the conclusion that Driver had acquired all the rights of a partner—that is, rights of interfering in the business—and must therefore undertake the corresponding liabilities.

(b) Smith & Co. owe money to Macpherson, and Macpherson consents to receive his debt out of the profits of their business. The agreement is something like this:—

Whereas Smith & Co. are indebted to Donald Macpherson in the sum of £100. Now it is hereby agreed that in discharge of the debt, the said Donald Macpherson shall receive one-fourth of the profits made by Smith & Co. for the years 1897 and 1898.

D. MACPHERSON.  
SMITH & CO.

By such an agreement, Macpherson does not become a partner of Smith & Co., though he shares in the profits of their business for two years.

(c) A servant or agent of a firm who is paid wholly or partly by a share of profits, does not necessarily become a partner. At the same time, if you engage a servant or agent to be paid according to the profits of the business, I advise you to be very careful about the terms of the engagement. For if you give him much power of control over the business, and the right to say that this or that shall not be done without his consent, you will very soon convert him into a partner.

(d) It is a very frequent stipulation in partnership agreements, that if one partner dies, the business shall belong to the surviving partner, upon condition

of his paying to the widow or children of the deceased a share of the annual profits. Thus, if A and B are the partners, and A dies, B is to pay one-third of the profits of the concern to A's widow so long as she lives ; such payment to be made annually (or quarterly, as the case may be). The Partnership Act declares that in such a case B's widow shall not be considered a partner.

(e) One of the most important items in a business is the goodwill. In fact, in many cases it is by far the most valuable part of the business. And it frequently happens that when Jones retires from the drapery trade, and sells his business to Smith, Smith pays so much cash for the stock-in-trade and shop fittings, and it is agreed that for the goodwill Jones shall receive half the profits made in the shop for the next year or two. The Statute again says that such an agreement, *of itself*, does not make Jones a partner with Smith. Here, again, the words in italics are most important ; for if Jones allows his name to continue over the door, and permits Smith to call himself Jones & Smith, or Jones & Co., Jones will be liable as a partner to all old creditors who deal with Smith under the impression that Jones is still a proprietor. Fortunately, printer's ink is cheap, and a halfpenny stamp suffices to frank a circular ; so I advise Jones to put himself to the modest expense of informing all his former creditors and wholesale houses of the fact of his retirement.

Let me point out also, that to lend money to a man in consideration of receiving a share of the profits of his business by way of interest, has its risks ; for should the borrower become bankrupt, or make a composition with his creditors, or die in insolvent circumstances, the lender will get none of his loan back until everybody else has had 20s. in the £. So that, though the lender may not be liable strictly as a partner, yet, as he takes his chance of a larger rate of interest, so also he takes his chance of losing all his money. The same rule applies when you sell the goodwill of your business for a share of profits., *E.g.* A has a drapery business, which he sells to B. For the goodwill, B is to pay £200 out of the profits of the first two years. If B fails in business, or dies insolvent, A will get nothing until all other creditors have been paid in full.

#### HOW PARTNERSHIP IS DISSOLVED.

**The length of a partnership.** — Sometimes partners agree that their relations shall last for a definite time, and such a clause has its advantages. For when no time is specified, the partnership can be dissolved by a single partner at a moment's notice. Such a notice must be given to all partners, and it can be either in writing or by word of mouth. When a definite time is fixed—five years, for instance—the partnership dissolves of itself at the end of the five years. But it frequently happens that two people who enter into partnership for, say, five years, go along so swimmingly that at the end of the time they have no wish to dissolve. I have known cases in which they have forgotten that the time of dissolution had come, and have continued the trade on the old lines. In such cases, after the fixed time has elapsed they become partners at will, which means that either of them can dissolve the firm by giving notice.

Until such notice is given, however, the business is to be carried on under



the terms of the old agreement. Apart from the lapse of time, there are other reasons for which a partnership may be dissolved. I will first deal with

**Dissolution clauses in the partnership agreement.**—Carefully drawn articles of partnership always contain an agreement that if any partner shall become bankrupt (sequestration in Scotland), or make a composition with his creditors, or become insane, or do or suffer anything whereby his interest in the partnership property shall become liable to seizure, he shall cease to be a partner. Such a clause ought never to be omitted, and there ought to be added to it a proviso that upon the partnership being dissolved for any of the above reasons, the remaining partner or partners shall have the option of purchasing the share of the former partner. There ought also to be a clause giving power to expel any partner for misconduct, or breach of the partnership agreement. If this be not done, the consequences are apt to be unpleasant; for there is no power to expel a partner for any reason whatsoever, nor to compel him to sell his share, unless it is so provided by the partnership agreement.

**Compulsory dissolution by the Court.**—There is no manner of need for a partnership to be dissolved by the Court unless it is for a fixed time; because, when there is no definite period named, either partner can give notice of dissolution at any time. But even when the partnership is for a fixed time, it often happens that a dissolution becomes expedient. For instance, Brown may compound with his private creditors, or may be sent to jail for swindling; or Smith, who has no authority to engage or discharge servants, may amuse himself by discharging all the men clerks, and engaging a set of lady type-writers in their stead—to the exceeding wrath of Brown, who hates women in the office. In all these cases, if there is no provision made by the partnership articles, the only remedy of the aggrieved partner is to apply to the Court, and have the firm dissolved and the business wound up.

Another cause for interference by the Court is the fact that the partners are at loggerheads to such an extent that harmonious business relations are impossible between them. It may be that the quarrel has nothing at all to do with the business of the firm. That makes no difference. The point is that when relations are strained beyond a certain point, the Court will deem it best that the parties should separate and the business be wound up. There is an old case recorded in the Reports—those volumes apparently so dry, but inwardly so full of human interest—of two old gentlemen who had been partners for years. They had renewed their agreement from time to time, and at the period of which I speak they were working under an agreement which had three years yet to run. Grigson will do for the name of one partner, and Jakes will serve for that of the other. Now Jakes, purely in his private capacity, had a slight unpleasantness with one of his neighbours, resulting in a lawsuit of which Jakes got very much the worst. Indeed, there could be no doubt that Jakes had acted very badly to his neighbour. After the trial, Grigson, an irascible old gentleman, used to occupy his spare time by reminding Jakes of his recent defeat. He went even further, for he thought it his right, or his duty, or both, to abuse Jakes for having lost the action. "You must have acted like a rogue," said he, "or the judge would not have decided against you." Jakes stood this kind of thing

as long as he was able, but finally his patience gave way, and he told Grigson to mind his own business in language of the very plainest kind. From that moment there was open war between the partners. They were both too honourable to neglect the business, but the concert was not harmonious. There were constant bickerings and snarlings, and at last Jakes applied to the Court of Chancery to have the partnership summarily dissolved. You would not think that Grigson would have objected to this ; but he did. He said, "There has been no breach of the partnership agreement, and the time for dissolving partnership will not arrive for three years. A squabble between partners is no ground for winding up the business." His lordship did not take that view. He decided that when the relations between partners were such as to make it impossible for them to work harmoniously together, one of them could come to the Court and ask for the contract to be dissolved. A slight tiff is not enough, but a continuing and continuous squabble is a ground for the Court's interference.

**The death or bankruptcy** of one partner dissolves the firm, unless there be an agreement to the contrary. Take this case :—Smith, Jones, and Robinson carry on business under the name Smith & Co. Jones dies. The firm of Smith & Co. is dissolved, unless there is some provision for it to be carried on by the survivors.

There is also a third case in which partnership may be dissolved without going into Court. It is when one partner has a judgment against him for a private debt, and his creditor applies to the Court to be allowed to "attach," that is, to seize his share of the partnership business. The other partners have the option of giving notice to dissolve the partnership at once. Note, please, that it is not a dissolution of itself, like death or bankruptcy, but it gives the other partners the right to say, "We will not continue our relations with you."

**The consequences of dissolution.**—After a partnership has been dissolved, each partner loses his authority to act on behalf of the other members of the firm, except so far as may be necessary to wind up the business. For instance, A and B are partners for an indefinite time. On the 1st of May, A gives notice to B to dissolve the partnership from that date. After this, neither A nor B may enter into any new contracts on the firm's behalf. They may, however, go on with pending business. Thus, if C owes the firm £20, he may pay A, and the latter has power to give him a receipt in the name of the firm.

*How a business must be wound up.*—On the dissolution of a partnership, each partner has the right to require that all the property belonging to the firm shall be sold. The proceeds are to be applied in the following order :—

- (1) In paying all debts that the firm may owe to outsiders.
- (2) In paying to each partner what is due from the firm to him for advances as distinguished from capital.
- (3) In paying to each partner the amount of capital which he has put into the business.
- (4) The balance (if any) is to be shared amongst the partners in the same proportions as profits.

Let me put this in the form of a table :—



*Epitome of Accounts on Dissolution of the Firm of Thurlmear & Co.*

Partners.—J. Thurlmear, T. Scawfel, and S. Kiddaw, who receive equal shares in profits.

*Capital.*

J. Thurlmear contributed	£ 500
T. Scawfel                   "	£ 1,000
S. Kiddaw                   "	£ 200

*Receipts from Sale of Business. Cr.*

Sale of stock-in-trade and fixtures	...	...	...	4,050
Sale of book debts	...	...	...	300
Sale of the lease of business premises	...	...	...	250
Cash in hand	...	...	...	400
Sale of goodwill	...	...	...	1,000

Total proceeds of sale of assets	...	...	£ 6,000
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*Dr.*

Trade debts due by the firm	...	...	...	£ 2,000
Rent	...	...	...	50
Wages	...	...	...	50
J. Thurlmear (capital repaid)	...	...	...	500
T. Scawfel ( " " )	...	...	...	1,000
S. Kiddaw ( " " )	...	...	...	200
				<hr/> 3,800

Leaving for division as profit	...	...	£ 2,200
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*Division of Surplus.*

J. Thurlmear (one-third)	...	...	£ 733 6s. 8d.
T. Scawfel (one-third)	...	...	£ 733 6s. 8d.
S. Kiddaw (one-third)	...	...	£ 733 6s. 8d.
			<hr/> £ 2,200

Note, please, that the surplus, after paying debts and repaying capital, is shared, not according to the capital of each partner, but according to the proportion of profits to which each of them is entitled under the agreement. It often happens that partners are to share profits equally, though one puts in £1,000 capital and the other contributes no money at all. You see, the one who does not embark any money in the concern may contribute business knowledge and experience that the monied partner lacks. This leads me to consider another matter that frequently crops up when a partnership is dissolved. It is the question of

**Premiums.**—Jones carries on the business of an auctioneer; and in course of time he finds that he has too much business for one man to attend to. So he looks round for a partner, and at last discovers Macgregor, a young man willing to become a partner. The business requires no more capital, so that Macgregor

FORM OF ARTICLES OF PARTNERSHIP.

# This Indenture

made the fourteenth day of June  
One thousand eight hundred and  
ninety eight Between John Smith  
of 12 James Street in the City of London of the one part and William  
Brown of 14, Prake Road, Birmingham of the other part  
Whereas the said John Smith now carries on the business  
of a Varnish Manufacturer at 12 James Street aforesaid And  
Whereas it has been agreed between the parties hereto that  
the said Business of a Varnish Manufacturer shall be hereafter  
carried on by the said parties in Partnership Now it is  
hereby agreed and declared as follows:—

- 1 The Firm name shall be John Smith & Co.
- 2 The Business premises of the Firm shall be at 12 James Street aforesaid and any other place or places that may be agreed between the Partners hereafter.
- 3 The Lease of the said Business premises now standing in the name of the said John Smith and all the stock in trade now therein and thereon and all book and other debts due or owing to the said John Smith in connection with the said Business the goodwill of the said Business and all fixtures, goods chattels effects, implements things in possession or in action appertaining to, connected with or used in the said business of a Varnish Manufacturer by the said John Smith shall become and be partnership property The Capital of the Firm shall be Seven thousand pounds of which Three thousand pounds shall be paid into the Firm's Banking Account within three days after the execution of these Presents by the said William Brown. The property mentioned in this clause hereof is agreed and taken to be of the value of Four thousand pounds and shall be contributed by the said John Smith as his share of the Capital
- 4 Profits and losses shall be divided between the Partners in the proportions of four sevenths to the said John Smith and three sevenths to the said William Brown
- 5 The Partnership shall last for Five years certain but after that date may be determined by either party giving to the other three months Notice in writing such Notice to be delivered to the party to whom it is given by leaving the same at the Counting



Dated 11<sup>th</sup> June 1898

Mr John Smith

and

Mr William Brown

Joint Authors

is not called upon to find money for that purpose. But the chances are that Jones will make it a condition that Macgregor shall pay a sum down for his share. It comes to this, that Macgregor pays Jones (say) £500 for the privilege of being admitted a partner. The agreement is that the partnership shall last for seven years; but long before that time one of the partners obtains a compulsory dissolution by the Court. Seeing that Macgregor paid £500 for a seven years' partnership, and it has only lasted (say) three years, can he demand the return of his premium? The answer depends on the answer to another question—By whose fault was the partnership dissolved? If the Court is of opinion that Jones's misconduct has led to the split, the judge will order either the whole or a considerable part of the £500 to be returned. When they are both equally to blame, his lordship may, if he thinks fit, order part to be refunded. How much or how little will depend on the size of the premium and the length of time that the partnership has lasted. Thus, when the premium was heavy and the partnership dissolved very soon after it had begun, the amount ordered to be returned would be large. In the case given above, Macgregor would not get very much. When Macgregor, by his own bad conduct, such as neglect of business, giving credit to untrustworthy persons, acting without consulting Jones, has fairly driven Jones to take steps to turn him out, the judge will not order any of the £500 to be returned. Let me also say that when a partnership is dissolved by death, return of premium cannot be claimed. Thus, if Jones were to die in a month, Macgregor could not claim any of his £500 from Jones's executors.

To this there is a distinct and somewhat obvious moral. If you are the Macgregor of my illustration, paying a premium for a partnership, take care to have it down in black and white that should the firm die a premature death, you are to have a proportionate part of your premium returned. When I settle articles of partnership I invariably advise the insertion of such a clause. Experience has told me that it is a very effective preventer of disputes, and if it be omitted a lawsuit is almost sure to arise if the partnership be dissolved prematurely. There is nothing much more difficult than to persuade a man to disgorge a premium that has once seen the inside of his pocket. On the other hand, you will hardly persuade the payer of the premium that he has not the right to the return of the whole of it if the partnership dies an early death.

#### THE RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS BETWEEN THEMSELVES.

**Duty to attend to business.**—It is the duty of every partner, unless it has been otherwise agreed, to attend diligently to the partnership business. When there are written "articles of partnership," a clause is generally inserted to this effect: "Each of the partners shall devote his whole time to the business of the firm"; but even when there is no such stipulation, the duty is there all the same. There are, of course, many men who are partners in more than one business. Sometimes one will be an active partner in a cotton-spinning mill, and a sleeping partner in an engineering works. In such a case, he will not be required to give any time to the engineering business; but he is entitled



to be consulted occasionally ; and may, unless he has agreed otherwise, interpose to prevent the active partners from taking steps that he deems to be disastrous.

When anyone intends to take an active part in two or more firms, he will find it wise to make an agreement beforehand as to the time he is to give to each. Unfortunately, no man can be in two places at once, "unless," indeed, as Sir Boyle Roche observed, "he is a bird"; and no partner, however willing, can devote his whole time to each of two businesses.

**Duty to avoid conflicting interests.**—In the previous chapter I have told you how it is the duty of an agent not to place himself in a position where his self-interest conflicts with his duty to his employer. In like manner, a partner is guilty of a breach of duty if he acts for his own private advantage against the interests of the rest of the firm. One of the ways of doing this is for a partner to engage in a rival business which competes with that of the firm. Let us see what happens if he does so. Campbell and O'Brien carry on the business of ship-brokers in partnership at Liverpool. Campbell, having money to spare, embarks it in the business of Jones & Co., ship-brokers. He does not take an active part in Jones & Co., being only a sleeping partner; but that business is really run with his money. Presently, O'Brien finds out what is going on and complains to Campbell. Campbell remarks, "It is no affair of yours. Do your worst"; upon which O'Brien consults his lawyer to see what that worst will amount to. It will amount to this: O'Brien can compel Campbell to account for every penny of profit that he has made out of Jones & Co., and that profit, whatever it may be, goes into and forms part of the profits of the firm of Campbell & O'Brien. In other words, if Mr. Campbell and Mr. O'Brien each take half the profits of their business, and it turns out that Campbell has made £500 profit out of Jones & Co., £250 will have to be given to O'Brien as his share.

Let me here repeat an observation that I have made several times before, namely, "Do not try to carry this doctrine too far." It only applies when two conditions combine—which are: (1) the second business *must compete* with the partnership business; and (2) the partner must engage in it *without the consent* of his partners. When we say that the business, to form a conflicting interest, must compete with the partnership business, we mean that it must be a business of the same character, which, in the ordinary course of trade, might be expected to compete with the partnership. For instance, in the illustration given in the last paragraph, Jones & Co., being ship-brokers, competed with Campbell & O'Brien, who were in the same line of business; though, as a matter of strict fact, Jones & Co. had not taken away one single customer of Campbell & O'Brien's, and had not even tried to do so.

But beyond this the law does not reach. For instance, a gentleman named Benham was a member of the firm of H. Clarkson & Co., ship-brokers. Without the consent of his partners, he joined with some other persons in forming the Naval Construction Company, Limited, ship-owners. It was held that Mr. Benham was quite entitled to do so, as the ship-owning business did not compete in rivalry with that of ship-broking. To the same effect was the case of Dean Brothers, salt merchants and salt brokers at Liverpool. One of the partners in the firm was a Mr. Macdowell, who appears to have had a good deal of money,

for he put a large sum of money into the firm of Ashton Brothers, salt manufacturers. Mr. Macdowell did not embark in salt manufacturing openly, but he put his young son—a mere youth—into Ashton Brothers, as a kind of representative and dummy. In time, Dean Brothers dissolved, and then, for the first time, the other partners heard that Macdowell had been for a long time a member of Ashton Brothers. Now Ashton's was a prosperous firm, and Macdowell had made great profits out of his share therein; and it struck his co-partners in Dean Brothers that they would make him turn it all over, and account for it as profits belonging to their firm. They tried it, but it was not quite good enough. As everybody knows, the trade of salt manufacturer is quite different from that of salt merchant and broker; so that there can be no competition or rivalry between them. Wherefore the Court of Appeal allowed Mr. Macdowell to keep in his own pocket the profits he had made out of Ashton & Co.

**Fidelity** of the most scrupulous kind must be observed by each partner towards his firm. Sometimes one meets with a case of this kind:—Nemo is a member of the firm of Smith & Co., being entitled to a one-sixth share of the profits. His firm tenders for a contract, out of which, if their tender is accepted, they will make a profit of £1,000. Now Nemo is about to leave the firm, under one of the terms of the partnership articles, by which the other partners have the right to buy him out for a fixed sum; so that Nemo will not gain anything if the tender above mentioned is accepted. Whereupon Nemo is shabby enough to go to Brown & Co., a rival firm, and offer to tell them the terms of Smith & Co.'s tender. Such information will be valuable to Brown & Co., for it will enable them to frame their own tenders at such a figure as to cut out their rivals. Accordingly they purchase the information from Nemo. I need not say that Nemo's conduct is bad. It is something more—it is actionable. It is misconduct of the worst kind in the eye of the law, and no judge would hesitate for one moment, on the facts, to dissolve the partnership *instantly*, and order Nemo to pay heavy damages for his breach of faith. Moreover, whatever he received from Brown & Co., as the price of his treason, would have to be given up to Smith & Co.

A second kind of case, of no uncommon occurrence, should be stated here. Jackson and Smith carry on business in partnership at 100, High Street, Puddletown, which premises they hold on a lease for seven years. The lease being almost up, Smith privily goes to the landlord, and makes an agreement for a lease to himself (Smith) as soon as the present one shall have expired. For Smith says to himself, "Should the partnership be dissolved hereafter, I, having the lease of the premises, shall have the whip hand of Jackson." Moreover, Smith has designs of sub-letting to the firm at a higher rent than he himself has to pay. In such cases, which have happened many times, the law has always interposed to checkmate Mr. Smith's subtle move. Of course, the law cannot compel the landlord to grant the renewed lease to the firm. He must grant it to Smith, because it is to Smith that he has promised to grant it. But the law pounces on Mr. Smith, and says to him, "We will compel you to do what is right. And to that end you shall be a mere trustee of the lease for the benefit



of your firm. In other words, although the lease is in your name, the benefit of it shall belong to the whole firm, not to you privately."

Another illustration of the same doctrine occurred a little while ago. It frequently happens that when a man with a flourishing business takes unto himself a junior partner, the senior partner stipulates that the whole of the goodwill of the business shall remain his. Practically this means that if they part company, only the senior partner has the right to trade under the firm's name and to represent to the world that he is carrying on the old business. A gentleman of the name of Trego admitted as his partner in the business of varnish and japan manufacture a certain Mr. Hunt; and amongst the articles of partnership was a clause stating that the goodwill of the business should remain the sole property of Mr. Trego. In course of time the senior partner died and, by another clause in the partnership agreement, his widow succeeded to his share in the business. The lady sold half her rights to a Mr. Wilson Smith, who was admitted into the firm, which now consisted of Mrs. Trego, Mr. Wilson Smith, and Mr. Hunt. Then Mr. Hunt made arrangements to quit the firm, but before doing so he copied, from the books of the concern, the names of all the customers. He made no concealment about this, but boldly admitted that when he withdrew from partnership he intended to set up for himself and to solicit orders from the customers whose names he had taken. Mrs. Trego and Mr. Wilson Smith declared this to be a breach of good faith and an infringement of their right to the goodwill. Mr. Hunt took a different view, and accordingly an action was begun by the two other partners, in order to prevent him from using the knowledge he had derived from the firm's books. As far as I know, this was the first time that the English Courts had been called upon to decide this point. They decided against Mr. Hunt. They said that he must not use the list of addresses of customers for the purpose of competing with the old firm, and that it was an illegal act for him to make copies of anything in the partnership books for the purpose of subsequent competition.

**All profits belong to the firm.**—Lord Justice Lindley, in his monumental work on partnership, says, "Good faith requires that no partner shall obtain a private advantage at the expense of the firm"; and the Partnership Act makes this doctrine the statute law of the United Kingdom. Before the Partnership Act it had long been settled to be the law both at London and in Edinburgh. The virtue of this proposition is, as Jack Bunsby hath it, in the application thereof.

Mr. Craven was a partner in Bentley & Co., sugar refiners, and it was his duty to select and purchase the sugar when it was wanted. A knowing man was Mr. Craven, well skilled in the art and mystery of buying in the cheapest market. Watching the time when sugar was likely to rise, he bought a large quantity—not for Bentley & Co., but for himself. When it had risen considerably, it fell out that Bentley & Co. wanted sugar for their refinery, and Mr. Craven, as usual, was deputed to buy it. He did not buy any, but supplied his firm with some of that which he had so prudently bought a little while before. In other words, he sold to Bentley & Co. some of his own sugar and he forgot to tell them that it was his. By consequence, he did not relate how cheaply he

had purchased the article, but charged Bentley & Co. the same price they would have had to pay had he actually bought the sugar at the time when he was requested to do so. And as he put his pretty little profit in his pocket, doubtless he chuckled a merry little chuckle and congratulated himself on his foresight. Mind, I have not the slightest doubt but that Mr. Craven's mind was guiltless of any dishonest designs. His partners, however, did not chuckle—a fact not to be wondered at when you reflect that they had not pocketed any profit on the deal. Indeed, they were so inconsiderate as to demand their money back; and when Craven stoutly refused to comply with the request, they brought an action. And, to Mr. Craven's disgust, the judge sided with the partners, and ordered the long-sighted one to share his profits with the other members of the firm.

Not altogether unlike the case of Mr. Craven was the case of Mr. English, who entered into partnership with Mr. Dunne, to buy a mine for £50,000, with the intention of selling it again. English was the moving spirit in the adventure, and it was ultimately arranged that he should sell the mine to X Y and Z for £60,000. This would leave a profit of £10,000 to be divided equally between the two partners. Instead of selling to X Y and Z for £60,000, Mr. English sold to a limited company for £70,000. He then handed over £5,000 to Dunne, as if he had sold it for £60,000 only. When Dunne discovered the real selling price, he claimed £5,000 more and got it; though he had to invoke the aid of the Court of Chancery first.

I always thought it rather hard on Mr. Horne, who, jointly with a Mr. Carter, bought a little estate. There were several mortgages on the land and these were to be paid off out of the purchase money. Now, Horne happened to be friendly with some of the mortgagees, and they, for friendship's sake, abated some of their claims, telling Horne that he might keep the abatements for himself. But the Lord Chancellor decided that Horne could not keep them for himself. He must, his Lordship ruled, allow Mr. Carter half the benefit.

On the same principle, one partner will not be allowed to use the firm's name for his own private purposes. I have already alluded to the case of H. Clarkson & Co., shipbrokers, in which firm a Mr. Benham was a partner. This Mr. Benham set up in business on his own account as a shipowner, and called himself "H. Clarkson & Co., shipowners." The other partners in the real firm of Clarkson obtained an injunction preventing Mr. Benham from using the name of the firm for his own private business.

**The rights of the majority.**—The Partnership Act of 1890 introduced, or rather made quite plain, the rule that in the ordinary business of a partnership, the majority of the partners must govern. Please note the word *ordinary*, for this defines the utmost limit of the rule. Cases have been known where partners have been under the impression that a majority of them could do anything they liked in connection with the affairs of the firm. For instance, before to-day it has been sought to expel a partner by a vote of the majority. This cannot be done, however badly the partner has behaved, unless the agreement of partnership has provided for that contingency.

Then, again, the majority cannot force on the minority a change in the



essential character of the business. To illustrate this:—A B and C carry on business in partnership as drapers. A thinks there is a good opening in the neighbourhood for a grocer's shop; so he proposes to B and C that they shall rent additional premises and add grocery to their drapery. B agrees, but C declines the venture. A and B cannot, though they are in a majority of two to one, embark on the grocery business in the name of the drapery firm. The reason is not far to seek. C can fairly and properly say, "I went into partnership with you in the drapery line, because I knew that we all three understood drapery, and I am quite willing to abide by your judgment in matters relating to that business. But as for grocery—I know nothing at all about it, and I have no reason to believe that you do; and I object to risk my credit and capital in a business which neither I nor my partners understand."

As the majority cannot expel a partner, so also they are unable to admit one without the consent of the minority. Put in other words, this is that the consent of every partner, no matter how small his share, is necessary for the admission of a new partner. Here, again, the reason is plain. If I go into partnership with Tom and Dick, presumably they are people with whom I expect to be able to rub along comfortably. After the business has been started, Tom and Dick express a desire to take Harry into the firm. I object. Being pressed for my reasons, I am unable to give any. I fully admit Harry to be well respected by his neighbours, to bear a good name in business, to have plenty of ability, to be sober, diligent, and generally of the best behaviour. Still, "I do not like thee, Doctor Fell." Now, although my reason is only a woman's reason—that is, no reason at all—I am entitled to have my wishes respected. For if Tom and Dick had the power to force Harry into the firm, the result would probably be disaster for us all. For if one partner has a dislike to another, however unreasonable the grudge may be, experience warns us that there is bound to be a collision before long. And as animosity, the philosophers tell us, is the strongest of the passions, we shall soon find that it will prevail over self-interest. The true interest of the firm will be lost in bickering and jealousy, and it is much if all the partners are not severely hit. For such reasons, you cannot have a partner thrust upon you against your will, unless it has been so provided by the partnership agreement (*see p. 569*).

**The majority cannot exclude any partner** from taking part in the business of the firm. Generally, each partner has his own particular department, and he very often resents it if any other partner attempts to interfere in that department. If a dispute arises on the point of undue interference by one partner with another, the matter can very properly be dealt with by the majority of the firm; but no majority can altogether exclude a partner from any department of the business. In other words, even if, by the will of the majority, Dick is appointed sole manager of the calico department, Tom is quite entitled to pry and prowl about to see that the work is being properly done.

**Keeping accounts.**—Most partnership articles contain a clause by which the partners agree to keep such books of account as are usual in that kind of business. Unless there is some such agreement, there is no legal duty imposed on the partners to keep books of account. Indeed, one sometimes hears of cases in

which no books are kept, and, more frequently, of partnerships where the books are badly and insufficiently posted up. Any of these courses is most unbusinesslike and may have unpleasant legal consequences. There is no limit to the mutability of human fortunes, and one often sees men in the bankruptcy court who, twelve months before, thought their businesses to be founded on a rock. Now, if any firm is obliged to put up its shutters by reason of insolvency, and its affairs are investigated in bankruptcy, one of the first things asked for will be the firm's books. And if no books can be produced, or if those in existence are obviously ill-kept, the members of the firm may get into trouble—to the extent of having their discharge suspended for a long time. This means, as I have before explained (p. 372), that not one of them can get more than £20 worth of credit without revealing the fact that he is an undischarged bankrupt.

All books of account must be kept at the firm's place of business—the senior partner cannot claim, for example, to keep them at his private house. And if there be more than one place of business, the place for the books is at the principal shop, office, or warehouse—at headquarters, in short.

Another fact to be remembered is, that every member of the firm has an absolute right to examine the books and all other accounts whenever he pleases. He has no sort of right to take them home in order to carry on his investigations; but he may examine them at the firm's business premises at any time he likes. So absolute is this right that a majority of partners cannot take it away from the minority, nor in any way curtail it. And should any partner be denied access to the books, he may at once go to the Court of Chancery [or Court of Session] and obtain an injunction [*Scotice*, inhibition] ordering his co-partners to cease from impeding him in the exercise of his right.

Another "accounts" clause not unusual in partnership agreements is to this effect: "The books shall be made up and a balance struck once a year on the 1st of January, upon which date profits shall be divided according to the shares agreed upon. The books, after having been made up, shall be signed by each partner, and such signature shall be binding; and no partner who has so signed shall be entitled to re-open the accounts." Such a clause is very useful and very businesslike; but its effect is not quite so great as many people imagine. Suppose that after the books are cast up and signed, partner Thompson discovers a mistake in the reckoning, he cannot claim to have it rectified. But suppose he finds that partner Nemo has "cooked" the ledger and hashed-up the cash-book with intent to defraud, he is entitled to re-open the whole account and to demand an investigation. Such cases have happened, and Nemo has replied, "You cannot go into that now. You should have complained before you signed the books. Having signed, the matter is done with." Nemo is very much mistaken. This is not a case of error or inaccuracy—it is a case of cheating; and to check cheating and fraud, especially as between partners, the Courts will go a very long way indeed. And in this case Thompson is quite right in insisting on the accounts being made up and investigated a second time.

Every partner has also the right to take copies of the firm's account books; though he cannot, as I have shown on page 580, make use of his information for purposes of subsequent competition after he has left the firm.



**Profits and losses.**—The profit's the thing, after all, and I take it that every partner, and every man to whom the hope of a partnership has been held out, will be anxious to know what share of profit he is or will be entitled to. Firstly, let me say that it is generally advisable in a partnership agreement to insert a clause stating in what proportions losses are to be borne and profits shared. This will be obvious when I tell you that by law all partners are entitled to an equal share of profits, and must bear an equal proportion of losses, unless they have expressly agreed to the contrary.

Here let me allude to a common popular error on this subject. Jay and Kay go into partnership in the hosiery business. Jay contributes £200, and Kay £100 capital, and nothing is said by either of them about the share of the profits that each is to take. At the end of the half-year, they find themselves £150 to the good, of which Jay claims £100—that is, two-thirds. He says, not unnaturally, "I have found two-thirds of the capital, and I ought to have two-thirds of the profits." But Jay is wrong. Kay, though he only contributed £100 to Jay's £200, may have contributed a far greater measure of skill, business ability, and knowledge. On the other hand, I know, he may not; for Jay, besides having more money, may have more brains than Kay. However that may be, Kay is entitled to one-half of the profits made.

As to losses, the result is the same. If, at the end of the first half-year, the firm has lost £100, Jay bears £50 and Kay the other £50. So that if they go on losing at the same rate for the whole year, each will have lost £100. In other words, Kay's capital will be altogether lost and Jay's will be half gone. The point is, that unless some express agreement is made, profits and losses are shared equally—not proportionately according to the amount of capital contributed by each partner.

**Capital, loans by partners to the firm, and interest.**—The *amount* of capital to be contributed by each partner must depend on the agreement of partnership. But questions have sometimes arisen as to the *proportion* to be contributed by each, and as to the proportions which have, in fact, been contributed by each. If Dee and Bee agree to enter into partnership, the firm to have £1,000 capital, the law presumes that each agrees to contribute half. And if a partnership is dissolved, and the assets have to be realised and divided, and it is impossible to discover how much capital each partner has contributed, the Court, or person who is winding up the business, must assume that each contributed equally. Suppose, for instance, that Dee and Bee are engaged in partnership and Bee dies. Dee continues to carry on the business with a view to making some arrangement with Bee's executors; but before any arrangement can be made, or any account drawn up, Dee also dies suddenly. Then the executors of Dee and Bee will have to sell the business to the best advantage, pay the firm's debts, then repay to each partner's executors any advances he has made (*see below*), and then take out each partner's capital before sharing the surplus as profits (*see p. 576*). Now the executors are unable to find any document showing the amount of capital contributed by Dee and Bee respectively. At last Dee's executor discovers evidence that Dee put in £10,000 as capital; but of Bee's contribution no trace can be found. It must therefore be taken

as proved (*i.e.* it must be assumed) that Bee also put in £10,000. From the partnership books it can be shown that Dee took  $\frac{2}{3}$ , and Bee only  $\frac{1}{3}$  of the profits; but, as I have shown, it does not follow that Dee contributed  $\frac{2}{3}$  of the capital. So that the assets of the firm will be distributed as follows:—

<i>Assets.</i>						£
Sale of business, stock-in-trade, book debts, goodwill, etc. ...						60,000
<i>Liabilities.</i>						
Debts, rent, etc. ...						20,000
For distribution ...						<u>£40,000</u>
<i>Dee's Share</i>						
Capital	...	...	...	...	...	£10,000
Profits ( $\frac{2}{3}$ )	...	...	...	...	...	£12,000
						<u>£22,000</u>
<i>Bee's Share.</i>						
Capital	...	...	...	...	...	£10,000
Profits ( $\frac{1}{3}$ )	...	...	...	...	...	£ 8,000
						<u>£18,000</u>
						<u>£40,000</u>

The practical moral is, that the agreement of partnership should state exactly how much capital is contributed by each partner. Then you have the fact on record, to be used when the partnership is dissolved. If not, it will not be difficult for a dispute to arise.

It very often happens that one of two partners invests more capital in the business than the other, and a very fair way of making matters equal is to agree that each partner shall have so much interest on his capital before the rest of the profits are divided. The rate of interest to be allowed is a matter for the partners to settle between them, but the usual rate is 5 per cent. You should note the fact that unless there is such an agreement, neither partner has any right to interest on his capital. He has only the right to his agreed-on share of profits.

The law is quite different in the case of "advances," as they are called in the Partnership Act. An "advance" is a sum of money lent to the firm by one of the partners. It differs from capital in several important respects. Capital is the sum contributed by each partner for the purpose of commencing or carrying on the business of a firm, and is intended to be risked in the business. A partner who has agreed to bring in so much capital can be compelled to do so, and he will not be allowed to take any of it out unless the firm is dissolved. I mean, of course, that he will not be allowed to take it out against the wish of any other partner; for if Jones, Stones, and Bones are partners in the firm of Jones & Co., and Bones wishes to withdraw £500 of his capital, he can do so if Jones and Stones choose to allow it. But if either of them objects, he



cannot. On the other hand, a partner cannot be compelled to find more capital than he has bargained to bring in as his share.

But it frequently happens—five times out of ten, in fact—that at some time or other the firm requires more money than the available capital amounts to. Thus, MacDermott and Carraway start a warehouse in partnership, capital £1,000, to be contributed equally. Each of them finds his £500, and the business is started. They go on and prosper, and soon find their warehouse too small for them. So they take other premises adjoining, but these are not properly adapted for warehouse purposes, and another £200 is necessary to pay for fittings, etc. The original £1,000 has been sunk already, so the firm has either to supply fresh capital or borrow. MacDermott has no more money, so, rather than upset the original equality of capital, Carraway lends the money to the firm. This £200 does not become capital. It is, for the time being, embarked in the business; but there are several differences between it and the £1,000 capital. In the first place, Carraway is entitled to 5 per cent. interest, unless he has agreed either to take no interest or to accept a different percentage. In the second place, Carraway can demand the return of the £200 whenever he wants it—just as any other lender might. He is not entitled to be paid so long as there are outside creditors unsatisfied; but his interest must be paid before any profits are divided, and before any interest (if any) is paid on the capital. Thirdly, when the partnership is dissolved, Carraway can claim his £200 as soon as outside creditors have been satisfied, and before each partner's capital has been deducted (*see* p. 576).

This becomes of great importance when the business is wound up and the assets are not sufficient to pay all the capital back. The following short tables show the position of Carraway, (1) when he has put in £200 as extra capital; (2) when he has advanced £200 to his firm. The firm is wound up and sold, lock, stock and barrel, for £1,500. The debts to outside creditors are £800.

*I.—Carraway invests £200 extra capital.*

Proceeds of sale of business	...	...	...	...	£1,500
Debts of the firm	...	...	...	...	£800
To be divided between the partners					<u>£700</u>
Carraway's original capital	...	...	...	...	£500
„ extra „	...	...	...	...	<u>£200</u>
					£700
MacDermott's capital	...	...	...	...	<u>£500</u>
Total					£1,200
Carraway is entitled to $\frac{1}{12}$ of £700	...	...	...	...	£408 6s. 8d.
MacDermott = $\frac{6}{12}$ of £700	...	...	...	...	<u>£291 13s. 4d.</u>

£700

*II.—Carraway advances £200 on loan to his firm.*

To be divided ... ..	£700
Carraway's loan ... ..	£200
Carraway's $\frac{1}{3}$ of £500 ... ..	£250
	— £450
MacDermott's $\frac{1}{3}$ of £500 ... ..	£250
	— <u>£700</u>

You see, this makes a difference of £41 13s. 4d. in Carraway's favour. So that it is always more advantageous to a partner to make an advance than to put in more capital than he originally agreed to contribute.

**What is partnership property?**—Before the Partnership Act, disputes sometimes arose as to property purchased by or in the possession of one partner, which the other members of the firm claimed as the property of the whole body. Sometimes, also, property belongs to persons who are partners which may or may not be partnership property. The statute (sections 20 and 21) lays down some rules on this subject which ought finally to dispose of the question printed at the head of this paragraph. One can easily see that not everything owned by two partners is necessarily part of the assets of the firm. For instance, John and Thomas are co-partners in trade. Senex dies, leaving a house to John and Thomas. That house, though it is the joint property of two people who happen to be partners, is not partnership property. The rules laid down by the Act are as follow:—

- (1) All property originally brought into the partnership stock; or
- (2) Acquired, by purchase or otherwise, on account of the firm; or
- (3) Acquired in the course of the partnership business, and for partnership purposes,

Are partnership property, and must be held and applied by the partners exclusively for the purposes of the firm.

- (4) Unless the contrary appears, property bought with the firm's money is deemed to have been bought on account of the firm.

(5) (A negative rule) When joint-owners of an estate or interest in land (or of heritable estate in Scotland), which land (or heritable estate) is not partnership property, purchase other land or estates out of the profits, they are not to be deemed partners in the new purchases, but only co-owners, having the same shares in the new estates that they had in the old ones. For instance, if Macdonald and Fergusson are co-owners of land in Perthshire, each having a half share, and they have a great cutting of timber on the estate, realising £1,000, and with the money so realised they buy another piece of land in Aberdeen, the purchased land will belong to Macdonald and Fergusson as co-owners, each owning half, but not as partners.

Now let me take an instance coming under (4). There were two partners, Robert Smith and Charles Smith, carrying on a brewery at Croydon as "Smith & Smith." Robert Smith had a notion of buying various houses for himself; but he had not sufficient money of his own for the purpose. Whereupon he



consulted his partner Charles, and Charles agreed that £8,500 should be advanced out of the firm's money to pay for the houses. Accordingly, Robert bought the property, and paid for it with Smith & Smith's cheque. In the firm's books Robert was debited with £8,500, for which he paid interest. Some years afterwards a question arose whether on the death of Robert, his widow would be entitled to her third (*see* p. 33). She said "Yes," and her husband supported her. The other side said "No, because the houses were bought with partnership funds, and do not, therefore, belong to Mr. Robert Smith, but to the firm." The Lord Chancellor, however, held it to be plain that Robert Smith had merely borrowed the money from the firm wherewith to buy the houses for his own use.

Let me add one more caution. It does not follow from the fact that a thing, originally belonging to one partner separately, becomes the property of the firm simply because the firm are entitled to use it for partnership purposes. Thus, O'Connor carries on a drapery business at a shop in Regent Street, of which shop he has a lease for twenty-one years. O'Connor takes into partnership, for a period of five years, one Doolan, and the business is carried on as before at the Regent Street shop, which is named in the partnership agreement as the place where the partnership business is to be carried on. Now, the firm has the right to use that shop for five years, but at the end of that time, Doolan has no further interest in the premises. The lease belongs to O'Connor as his separate property; unless, indeed, he has agreed that the whole lease shall belong to the firm. It sometimes happens, also, that office furniture, shop fittings and the like, are the sole property of one of the partners. Thus, if I carry on the business of an auctioneer with you, and out of my own pocket I buy an armchair, and take it to the office for my greater ease and comfort there, the chair does not become partnership property.

The true way of finding out what is partnership and what private property, is to ascertain what agreement was made about it, and this is not always an easy matter.

**Goodwill** has been referred to several times in the course of this chapter, but I have not yet explained it or defined it. Indeed, the expression is one of those in common use, of which everybody understands the meaning in a general sort of way, but which no one seems able to define satisfactorily. The best definition I know is one given on high judicial authority: "The benefit arising from connection and reputation." We all know, too, that goodwill may be attached to a particular house, or it may be attached to a particular name. The most obvious instance of the former is in the case of a public-house. The "Ship" inn at Brighton is a valuable piece of property almost solely because it is a house that has acquired a wide reputation; and visitors to London-by-the-sea would tell the cabman to drive to the "Ship," without asking whether it had changed hands or no. On the other hand, if Cassell and Company were to sell their place of business in La Belle Sauvage, their connection and custom would not pass to the buyer unless they also sold to him their name. For Cassell and Company's goodwill lies in their old name. Again—a third case—the goodwill of the Dungeon Ghyll Hotel in Cumberland depends on the fact that it is situated just at the foot of the Langdale Pikes. Here you have

a goodwill depending on situation and locality, and whoso takes the house takes, perforce, the goodwill attaching to it.

But if a firm is dissolved, and the goodwill sold, there is nothing to prevent the old partners from setting up in business next door, nor from soliciting orders from the customers of the old firm. They must not represent that they carry on the old business, and that is all. Take note of this case:—Mr. Churton, Mr. Bankart, and Mr. John Douglas carried on business under the name of “John Douglas & Company” at Bradford, as stuff merchants. “The business,” as the Report of the case says, “was successful and lucrative, and the reputation of the firm of John Douglas & Company of Bradford stood high in the trade.” Mr. Douglas retired from the firm in July, 1857, and, with the consent of his partners, sold his share in the business to a Mr. Hirst. Churton, Bankart and Hirst continued to carry on the business at the old address under the old style of John Douglas & Company. The agreement by which Douglas sold his share contained a clause to the effect that Douglas sold, and Churton, Bankart and Hirst bought for the sum of £15,000 “all his shares, rights, and interests in the trade or business then carried on by him and Churton and Bankart in co-partnership, and under the firm of John Douglas & Company *and the goodwill thereof.*” Notice of Douglas’s retirement was sent to customers, and the dissolution was gazetted. In February, 1859, Douglas entered into an agreement with three old servants of John Douglas & Company, named Liversidge, Parker and Shepherd, to go into partnership with them as stuff merchants; and the new firm set up next door to the old one, and also called itself “John Douglas & Co.,” which name was engraved on the doorplate. Douglas also sent a circular round the trade announcing the new partnership; and many copies of the circular were addressed to customers of the old firm of John Douglas & Company. Messrs. Churton, Bankart and Hirst considered themselves defrauded, and no wonder. So they took proceedings in the Courts to have Douglas restrained from (1) carrying on business as a stuff merchant at Bradford; (2) from soliciting the old firm’s customers; and (3) from calling the new firm “John Douglas & Co.”

On the last point they were successful; on the first two they failed. So that the new firm (Liversidge, Parker, Shepherd & Douglas) remained at liberty to carry on business next door to John Douglas & Company, and to solicit their customers, but were not allowed to assume the name of “John Douglas & Co.” “The goodwill,” said the judge, “is nothing more than the probability that the old customers will resort to the old place.”

**Practical advice.**—When you buy a business and goodwill from a dissolving partnership, or when you buy the share of a retiring partner, take care to make the seller enter into a special agreement that he will not solicit the old customers, nor set up in rivalry. The last clause, being one in restraint of trade, must always be reasonable—*i.e.* not unduly oppressive—as you will find explained in Chapter I. of this Book, pages 315–19.

Now let me take a case of dissolution of partnership where nothing is said about the goodwill. For example, Percy and Evans carry on business as drapers at 1.002, Regent Street. The lease of their shop comes to an end, and they



resolve to part company. They sell their book debts to one man, their stock-in-trade to another, pay their debts, and share the balance. They agree not to sell the goodwill. Then Percy hires a shop in Piccadilly, and Evans one in the Edgware Road, and each sets up business for himself. Percy paints over his shop window, "Percy, successor to Percy & Evans, late Regent Street." This, I think, is unlawful; because Percy by so doing is representing that the goodwill of the late firm belongs to him, and Evans has a good right to object. On the same reasoning, Percy could object if Evans set up as "Evans, late Percy & Evans." The fact is, that in such circumstances the goodwill of "Percy & Evans" has vanished into thin air, and the best thing the late partners can do is to agree as to which of them is to use it. Or, it may be, their new shops are so far apart that neither objects to the other calling himself "late Percy & Evans."

**Transfer of a share in a partnership.**—By the Partnership Act the right of a partner to assign (*i.e.* transfer) his share is recognised. In Scotland this has always been declared to be the law, but in England it was doubtful whether such a right existed. Now, however, the law is settled, and is the same in both countries. It must not be thought, however, that if A B and C are partners, and A transfers his share to X, that X becomes a partner in A's place. As I have shown on page 569, B and C cannot have a partner foisted on them without their consent. Let us see, then, what are the rights of the person who takes a transfer of a share in a partnership. I think this will best be shown by an illustration.

Pickwick, Weller and Winkle are partners in a brewery, each with an equal capital, and each entitled to one-third of the profits. The partnership is for ten years from 1891. In 1896 Winkle assigns his share to Tupman, as security for a loan. This does not put an end to the partnership between Pickwick, Weller and Winkle. Its only effect is to entitle Tupman to one-third of the profits, which must be paid to him instead of to Winkle. Tupman has no right whatever to interfere in the concerns of the partnership. He cannot require any accounts of the transactions of the firm; nor can he claim to inspect the partnership books. When the time comes (say) at the end of every year for the firm to make up its accounts and divide its profits, Pickwick, Weller and Winkle attend to this, and Tupman must accept whatever account of profits they three choose to agree to. Of course, if the three of them combine to swindle him by showing less profit than they have really made, he is not bound to tolerate such treatment, for it amounts to fraud. But anything less than fraud he cannot complain of.

In 1901 the partnership is dissolved. Tupman is now entitled to receive whatever share of the partnership assets Winkle would have been entitled to. If there is a complete dissolution, Tupman can compel a sale of the whole of the partnership property, including the goodwill, and, after paying the debts of the firm, he will receive one-third of the balance. From the moment of the dissolution, Tupman's rights increase. He can demand an account of all transactions from the date of dissolving, and is not obliged to accept as gospel any account that Pickwick, Weller and Winkle may choose to give him.

## THE RIGHTS, DUTIES AND LIABILITIES OF PARTNERS AS REGARDS THE PUBLIC.

The right of each partner to bind the firm is a matter constantly arising in one form or another. I do not mean the right of a partner to bind his firm as between himself and the firm, but as between the firm and the person dealt with. To put an instance : Jenkins is one of a firm of merchants, trading as the Improved Glass Marble Association, the other members of the firm being Smithson and O'Connor. Jenkins "accepts" a bill of exchange, writing across the face of it, "Accepted payable at the Bank of Baroda.—THE IMPROVED GLASS MARBLE ASSOCIATION." This bill comes into the hands of Mr. Davis, a holder in good faith and for value (p. 457). Smithson and O'Connor knew nothing of the bill when it was accepted.

Now whether, as between the three partners, Jenkins had any business to put the firm's name on a bill of exchange, depends on a variety of circumstances. The questions arise, "Do the partnership articles say anything on the subject?" and "Has it been customary for one partner to append the firm's name to bills or paper without consulting his co-partners?" These and many other questions arise ; and should the answers show that of right the bill ought to have been submitted to all three partners before acceptance, it follows that Jenkins has done wrong. He has broken the partnership agreement and is liable to make good any loss his firm has sustained. It may even be that the other two partners have a good right to a dissolution of partnership. But this, you see, is between them three. It concerns not Davis, the holder of the bill.

Davis's position depends on two things—namely, (1) the kind of business carried on by the partnership ; and (2) whether or not he had any notice that Jenkins's authority was limited by the articles of partnership. For the law both in England and Scotland is that *every partner is the agent for his firm in all matters lying within the scope of the firm's business*. In other words, every partner has apparent or ostensible authority to transact in the firm's name any of the ordinary business of the partnership. And it makes no difference whether the partner so acting is the senior or junior partner—every partner has the same authority in this respect. In the case before us, the firm is a firm of merchants ; and everybody knows that merchants, in the ordinary course of their business, accept bills. I know firms who never do so ; but these be few and far between. Since, therefore, it is part of the ordinary business of merchants to accept (and also to draw) bills of exchange, Jenkins had apparent authority to do what he did—namely, sign his firm's name to the bill in question. And the firm will be obliged to pay the bill, although the majority of the partners had forbidden Jenkins to accept bills without consulting them.

Now for the second consideration. Jenkins acted wrongly to his partners when he used their name on his own responsibility. Did Davis, when he became the holder of the instrument, know of this fact ? If he did, he must take his chance against Jenkins alone. He cannot touch the firm. Let me give an instance : Jackson is a creditor of Jameson, Dow & Macgregor. That firm has sent out notices to its creditors and customers in this form : "All cheques must be countersigned by two of the partners." One of these notices has been sent to Jackson :



but he has forgotten all about it; and one day he calls and sees Mr. Jameson, who gives him a cheque signed "Jameson, Dow & Macgregor." When the draft is presented for payment the bankers of the firm refuse to meet it. Jameson brings an action on the dishonoured cheque against the firm. The latter will win. Why? Because Jackson has had notice that one partner has no right, of his own authority, to sign cheques on the firm's behalf.

Let me here show you, by another instance, how a firm will not be liable for the acts of a partner when these acts are outside the scope of the partnership business. Taip, Wafer and Parchmentz are solicitors. Parchmentz draws a bill of exchange, signing it with the firm's name, and discounts it to Miggins. Messrs. Taip and Wafer did not expressly authorise their partner to draw the bill. The firm is not liable to pay. Why not? Because solicitors, in the ordinary course of business, have no occasion to use bills of exchange, and therefore Parchmentz was acting outside the scope of the business of the firm.

You see, it would be absurd to say that a firm should be bound to stand by anything and everything done by one of its members, whether it related to their common concerns or not. It would be equally absurd to say that a firm should not be responsible for the acts of a single partner unless they had expressly empowered him to do those acts. The line drawn by the law is, in practice, a clear and a simple one. It comes to this: If you are dealing with Mr. Sellars, of the firm of Byer & Sellars, woollen manufacturers, and he buys from you, in the name of his firm, a quantity of wool, you can make his firm pay for it. But if he purports to buy from you, on behalf of his firm, one hundred barrels of cod-liver oil, his firm is not responsible for the price unless he had actual instructions to make the purchase. The reason is that you were justified, according to ordinary business usages, in believing him to have authority to buy the wool; but you were not justified in believing that a firm of woollen manufacturers had any need for cod-liver oil.

The principle is, that any act done by a partner for carrying on in the usual way business of the kind generally transacted by firms of that class, is an act for which the firm is liable. And the only exception is where the partner had in fact no authority so to act, and the person with whom he is dealing *either* knows that he has no authority, *or* does not know him to be a partner. There is an extraordinary case of a firm called Blank & Co., who were in desperate straits for money. One of the partners borrowed a sum, which actually saved his firm from ruin. But because borrowing money was not a usual transaction in the ordinary way of the firm's business, the partnership was held not liable to repay the loan.

**The implied powers of partners.**—When I say that a partner has certain implied powers, I mean that a partner can bind his firm by doing the acts specified, always provided that the person with whom the act is done did not know that the partner had no such authority.

A partner may engage *agents* and *servants* for the performance of the usual business. Whether he has a right to discharge them without consulting his partners is a disputed point. Lord Justice Lindley thinks that he can, so long as he is not actually forbidden to do so.

I have spoken elsewhere (p. 591) of the power of a partner to draw, accept, or endorse *bills of exchange* in his firm's name. The law appears to be that every member of an ordinary trade firm has this power; but he can only do this in the ordinary course of the partnership business. A case that happened many years ago shows the danger of one partner giving a bill in the firm's name without consulting his colleagues. A and B were merchants in partnership, who owed £100 to Pickwick. A gave a bill in the name of the firm to Pickwick for £100, without consulting B. B also gave a bill for the same debt, without consulting A. Pickwick promptly negotiated A's bill to Micawber, and B's bill to Swiveller, neither of whom knew anything about Pickwick's little game. Both the bills were duly presented. Micawber's was met, Swiveller's was dishonoured. Hence Swiveller brought an action against A and B, and they had to pay him, too—a warning to them, I hope. Of course, they could have recovered £100 from Pickwick; but that worthy had gone, leaving no address. *Promissory notes* are on the same footing as bills.

*Borrowing money* is one of the implied powers of a partner only when the partnership is a trading one, where the business cannot be carried on in the usual way without such a power. And even then the firm is not liable when the money is borrowed by one partner in order, as he tells the lender, to raise his share of capital; for that is a purpose of his own. Moreover, if the business is one of a kind generally carried on upon a cash basis, the firm will not be liable even though the partner has ostensibly and actually borrowed it for the service of the concern. As an instance, take the case on page 592, where money was borrowed to save the firm from ruin. You should be careful not to lend money to one member of a firm of solicitors, even though he pretends to be borrowing in the name of his firm; for a solicitor's business is not a trade, and in the ordinary course they have no need to borrow for business purposes. So be careful, before making such a loan, to see all the partners in the legal firm.

Another point in the same connection is this:—Suppose the firm to be a mercantile one, each partner having power to borrow on the firm's credit; and one partner borrows at an exorbitant and unusual rate of interest. Is the whole partnership liable to pay such interest? There was a case of a man who lent £6,000 to one partner of a firm called Cyprien Fabre & Co. The partner who borrowed the money agreed, on behalf of his firm, to pay about 35 per cent. interest; and the House of Lords decided that the partnership was bound to pay it. The principle is, that when an agent has power to borrow money, he has power to arrange the details, such as the rate of interest, the time of repayment, and the security that shall be given to the lender.

*To render accounts and receive payment* is another implied power of every partner. I have known cases of firms who give notice to their customers, "No receipt will be acknowledged unless signed by two members of the firm"; but such cases are of the rarest. And unless such a notice is given, any customer may safely pay to any partner a debt due to the firm; for, as lawyers put it, "payment to a partner is payment to the firm." It is the same with regard to accounts. An account made out by one partner is binding upon his co-partners. Thus, when A B had cross accounts with the firm of X, Y & Z, and Y, one of the partners,



made out an account showing a balance due to A B, bearing interest at 9 per cent., it was held that the firm of X, Y & Z could not dispute that account.

*Banking account, cheques, and overdrafts.*—One partner has no right to open a banking account in his firm's name ; but he may draw cheques in the partnership name on their existing account. Moreover, if one partner "stops" a cheque given by his firm, the bankers are bound to obey the order. But no partner has the power to give a post-dated cheque—*i.e.* he may not sign a cheque with the firm's name on the 1st of April and date it the 1st of May. As to overdrafts—overdrawing is merely borrowing money from the bank ; and if a partner has the right (as he has in nearly every trading concern) to borrow money in the usual course of business, he may overdraw on the firm's banking account. All this, as far as the banker is concerned, may be varied if he has notice of a different arrangement between the partners. In very many firms, when the partnership commences, all the partners go down to the bank, open an account, give the banker a specimen of each of their signatures, and tell him not to honour any cheques unless they are signed by two members of the firm. Should the banker disobey these orders, and honour any cheque not so signed, he will have to refund the amount.

*Obtaining goods on credit.*—In almost every kind of firm—in fact, I do not know an exception—each partner has power to obtain goods and work on credit. This power exists even when there is no right to borrow money. Thus, a solicitor has no power to borrow money on his co-partner's credit ; but if he orders stationery, or engages a law stationer to copy deeds, the firm will be bound to pay. Obviously, the power only extends to the kind of goods or work usually required for the purpose of that kind of business. Suppose, for instance, the said solicitor requests a carpenter to go to his private house and do some repairs, telling him to send the bill in to the firm, the workman has no right to expect the firm to pay him. The reason is that he ought to have known that it is not within the ordinary scope of a lawyer's business for the firm to undertake the repair of the partners' houses.

*Executing deeds* is not included in the implied powers of a partner. Thus (in England), if a deed is expressed to be made between A, B & Co. on the one hand, and John Jones on the other, and X Y, one of the partners in A, B & Co., signs and seals it, "A, B & Co.," the other partners are not bound. Such was the case where a Mr. Elliott wished to have the security of a bond from the firm of "Davis and Marsh," so he took the document to their warehouse and laid it before Mr. Davis, the senior partner, who signed it "Davis and Marsh," and placed the seal opposite the signature. It was decided that the deed was binding on Davis personally, but not on Marsh. Therefore (in England) when you want a firm to execute a deed, make all the partners do it ; for only those who sign and seal will be liable. To this rule there is one exception—if one partner signs the firm's name and seals the document *in the presence* and *with* the consent of the others, it is just as though they had all signed and sealed it.

*Guarantees.*—I should always be very careful how I accepted a guarantee from a firm. It may be that I have dealt with Jones, Brown & Co. for years, and the partner with whom I have come in contact is Brown. One day

Macpherson comes to me and asks me to let him have a loan for three months. "On what security?" I inquire. "Jones, Brown & Co. are ready to guarantee it," is the reply. Off I go to Jones, Brown & Co.'s office, see my old friend Brown, and ask him all about it. "Certainly," says he, "we are willing to guarantee the loan"; and he then and there sits down and writes a guarantee. "We hereby guarantee to you the repayment of the sum of £200 lent by you to Macpherson at our request.—JONES, BROWN & Co." I think this to be safe enough, and hand over the £200 to Macpherson. At the end of the three months, when Macpherson ought to repay me, he fails, and I apply to Jones, Brown & Co. That respectable firm can pay me if it likes, but need not unless it chooses, for it is not bound by the guarantee. Of course Brown is liable.

I have supposed a case where the guarantee might not be in any way advantageous to the firm; but the decision is precisely the same if it were for their own benefit that the guarantee was given. Messrs. Williams & Co. were railway contractors, who sublet part of a contract to X Y. X Y wanted coal to enable him to perform his sub-contract, and he went to Messrs. Brettel and asked them to supply it; but X Y's credit was not good, and Brettels refused to supply him unless they had a guarantee. Whereupon one of the partners in Williams & Co. gave the required undertaking, signing it "Williams & Co.," and intending it to operate as a guarantee by his firm. X Y did not pay Brettels, with the result that the latter came upon Williams & Co.; but Williams & Co. repudiated altogether the guarantee given by their member. Brettel & Co. invoked the aid of the law, but took nothing by that; for the Court regretfully but firmly decided against them.

I have told you (p. 345) that a guarantee must be always evidenced by some written document, signed by the guarantor. Now, provided that a partner has actual and specific authority to give a guarantee in his firm's name, his signature is enough evidence against his partners to satisfy the law on this point.

*Representations as to credit.*—It frequently happens that a firm receives an inquiry as to the credit of one of its customers or correspondents. Thus, "To Messrs. Pastell & Pallett. Gentlemen,—We shall be glad to hear what you know of the credit and solvency of Mr. Crabappel of Taunbridge, who has referred us to you.—Yours truly, CLIPPER & STYX." To this a reply is sent: "Dear Sirs,—Mr. Crabappel is of good credit and position in the trade.—Yours truly, PASTELL & PALLETT." In fact, Crabappel is on the verge of bankruptcy, as Pastell & Pallett well knew; but Clipper & Styx are led, by the flattering terms of Pastell & Co.'s note, into giving Crabappel large credit. Down goes Crabappel; and Clipper & Styx see what they can do against Pastell & Pallett by way of damages for false and fraudulent representations. First of all, they must find out who signed the letter; because only the partner who did so sign is liable on it.

*Leases to and by partners.*—One partner has no power to take a lease of premises in the firm's name, nor even to negotiate for one, unless the other partners specially authorise him. But when a partnership takes a lease in the name of the partners jointly, any one of them can give notice to quit.



The like rule holds good as to granting a lease. One partner may not make a lease for them all, but he may give a tenant notice to quit. And, moreover, one partner has power to give orders to a bailiff to distrain on the firm's tenants for rent overdue. Consequently, if A is the tenant of X, Y & Z, who are partners, and X orders a bailiff to distrain on A, and the distress is illegally carried out, all the partners are liable to A in damages.

*Miscellaneous.*—An *insurance* of buildings or goods belonging to the firm is valid if made by one partner, and the same applies to insurance of a ship or its cargo. On the other hand, a partner *cannot* make his co-partners partners in another business. A point sometimes arises as to the right of a single partner to *release* from his liability someone who has become liable to the firm. For example, one Weston published a libel on Furnival & Co., and the firm brought an action for defamation of character. One partner then agreed to release Weston from his liability to the firm. The other partners protested, but it was of no avail. It was held that they could not go on with the libel action, as the release was binding on the whole of them. And this is always the decision when the release is given without any fraudulent intention. But if the debtor and the partner have conspired to defraud the other partner, the release will be invalid.

**Wrongful acts, frauds and breaches of trust.**—The liability of all the partners for wrongful acts, frauds and breaches of trust is the same as the liability of a principal for such acts committed by his agent. Therefore, it does not so much matter whether all the partners have authorised or are aware of the wrong committed by one of their number, as whether the act done is within the apparent scope of their guilty associate's authority as a member of the firm.

To clear the ground, let me say once and for all that if you can prove that all the partners knew of or authorised the guilty act, you can hold the whole firm responsible for the consequences.

In the second place, let me say that when the wrong has been done in the name of the firm, and the partners, though they authorised it not beforehand, yet afterwards adopted it, the whole firm must answer for the misdeed.

These two cases are clear; but, unfortunately, they occur the least seldom. The most usual case is where the wrong, the fraud, or the breach of trust has been committed slyly and secretly by a single partner, without even so much as a suspicion being raised in the minds of his colleagues. There are other cases where the wrongful act is not of a fraudulent character, but is the result of some negligence on the part of one partner. The rule on the subject as laid down by the Partnership Act, I here set out in full, deeming the subject of no small importance both to the innocent partners and to the sufferer:—

**SECTION 10.**—Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act

Now, having stated the law, let me proceed to the application thereof, as exemplified in numerous cases scattered up and down the pages of the Reports.

There was, in the year 1821, a firm of stage-coach proprietors, who plied between Manchester and Congleton. The firm consisted of a Mr. Hardern and two others whose names I know not. One day the stage-coach set out with a competent driver in charge, and with Mr. Hardern sitting on the box-seat. A little way out of Congleton, Hardern himself took "the ribbons" and the whip, and tooled the coach along quite merrily, until he came to a rather difficult bit of road, where a certain Moreton was peacefully driving his cart. Hardern, to show his skill as a whip, tried to shave past Moreton's cart without relaxing the speed of the coach. But alas! as amateurs so frequently do, instead of dashing past Moreton, he dashed into him, maiming and bruising him full sore. Now, Moreton brought an action against the whole firm of coach proprietors, and won it, although the two who had not been on the coach strongly resisted the claim. The Court held that in driving the coach, Hardern was acting in the ordinary course of business of the firm; therefore the firm was responsible for his negligent and unskilful driving.

Not dissimilar was the case of Mellors, a Sheffield collier, who worked in a pit belonging to Messrs. Shaw & Unwin. Shaw was the active, managing partner. It appears that one of the dangers of them that go down to the coal in pits is the falling of stones that may be loosened when the cages containing the men are being let down or drawn up; and there ought to be "bonnets," or metal awnings, over the cages to ward off such falling stones. Better had it been for Messrs. Shaw & Unwin had they provided "bonnets" for the cages at their pits. They omitted this precaution, however, and one day, when Mellors was coming up in the cage, a loose stone fell on his head, to the great detriment of that useful portion of his anatomy. When the unlucky fellow brought an action against his employers for damages for negligence, Mr. Unwin replied, "I was not negligent." To which three judges made answer, "True, you were not personally to blame; but your partner, acting in the ordinary course of the firm's business, was negligent; and you are both liable to pay."

More recently, there was an action against the members of a firm of solicitors named P, Q & R, on this ground: Q received a letter from some trustees asking him whether a certain investment was "safe." Q advised that it was safe. It wasn't. A considerable amount of trust money was lost, and the trustees had to make it good. Then they came on P, Q & R, the solicitors, for giving them such negligent advice. P and R said, "We never heard of it before. You must take it out of Q, if anybody." But Mr. Justice Stirling said otherwise. He held P and R to be liable, because Q, in giving the advice to the trustees, was acting within the ordinary course of the business of a firm of solicitors, and the whole firm must stand or fall by his act.

When it comes to a deliberate fraud committed by one member of a firm, there may sometimes be difficulty in making the innocent partners liable, but there is, in principle, no difference between their liability for the fraud of a fraudulent partner, and their liability for the negligence of a negligent partner. The test is, was the fraud committed while the partner was apparently acting in ordinary course of the firm's business? If so, all innocent partners are liable. If not, not.



Messrs. Devaynes, Dawes, Noble, Croft & Barwick were bankers at Newcastle. Devaynes was a sleeping partner, who knew very little of what was being done by the other members of the firm. A customer named Clayton deposited at the bank two exchequer bills for £500 each, upon the understanding that when the bills were paid off by the Government, the bankers should receive the money and re-invest it for Clayton. Devaynes knew nothing of the arrangement nor did he know that soon after receiving the bill, the other partners cashed it, instead of waiting for it to be repaid, and instead of handing over the money to Clayton, or re-investing it, they used it for some unlawful purpose of their own. Nevertheless, it was decided that Devaynes, however innocent, was liable to Clayton, because the business undertaken by the firm was ordinary bankers' business.

In the same case, a claim was made by one Wigglesworth, who had handed money to the firm to be invested in the name of Noble (one of the partners) for his (Wigglesworth's) benefit. Noble sold the stock, and the money was used by the firm—without the knowledge of Devaynes. Nevertheless, Devaynes was held liable, because the investment of money for customers was part of the firm's ordinary business; therefore he, as a partner, was liable.

There are many banking cases on this point, and an equal number of cases where the fraud has been committed by one member of a firm of solicitors. Let not this give the cue to those small wits who prate of "lawyers and rogues." My own experience has been that solicitors, despite lamentable lapses on the part of a few unworthy members, are men of the greatest integrity. When I see the case of a solicitor who has misapplied his client's money, I think of the hundreds of solicitors and their clerks who, with unrivalled opportunities for roguery, are yet honest to the last farthing. At the same time, going back for a hundred years, one may find many cases where money has been entrusted to one member of a firm of solicitors to be invested, and he having misapplied it, the client has come upon the innocent partners to make good the loss.

Such was the case of Messrs. Gregory & Son, who carried on a solicitors practice some years ago, the firm consisting of Jonas Gregory and his son William. They had a client named Mrs. Plumer, who came into the sum of £3,000, and this sum she asked the Gregorys to invest for her. They found her an investment on the security of an advowson (right of presentation to a church) for £1,300 of the money; and both of them signed a receipt for the money, and an undertaking to obtain a mortgage for her. Shortly afterwards, Mrs. Plumer saw William Gregory at a friend's house, and he induced her to hand over the other £1,700 for investment; but this time he did not specify any particular investment, as had been done before. Jonas knew nothing about this transaction. Ultimately, William got hold of both the sums and spent them. Mrs. Plumer took action with the view of making both father and son liable for the £3,000; but Vice-Chancellor Malins would not have it. He held that it was part of a solicitor's ordinary business to receive money for investments on particular named securities; therefore, Jonas, as well as William, was liable to refund the £1,300. On the other hand, it was no part of a solicitor's ordinary business to receive moneys for investment generally—

that is, without specifying the exact investment—therefore, Jonas, being no party to the fraud, was not liable.

So that if you ask me, "Am I liable, though personally free from guilt, for the frauds committed by my co-partner?" I should answer you, Scottish fashion, by another question, "Was the fraud committed while your partner was doing such business as your firm usually undertakes, or professes to undertake?"

With reference to the misappropriation of money, it should be noted that there are two classes of cases. (1) Where one partner, without the knowledge of the others, receives money in the name of the firm and misappropriates it. Such was the case of the £1,700 received by William Gregory, just referred to. (2) Where the money is received by the firm, with the knowledge of all the partners, and is afterwards taken and misappropriated by one of them. The liability of the partners again depends on the answer to the question, "Was the money received in the ordinary course of business?" If the answer be "Yes," then the whole firm must make good the loss. If "No," then the guilty partner alone is liable.

I daresay many of you have heard or read of the Fauntleroy forgeries. Strange it is, by the way, that the name of this prince of forgers should have been selected as that of the young and innocent hero of a novel. The Fauntleroy of whom I write, however, was not a little Lord, but a partner in the banking firm of Marsh & Co. Amongst other feats of penmanship, he forged the names of some customers to a power of attorney, and by that means beguiled a stockbroker into selling those customers' stock. The broker paid the money into Marsh & Co.'s account at Martin, Stone & Co.'s. Then Fauntleroy forged a cheque in the name of his firm, drew the money out of Martin, Stone & Co.'s, and put it in his pocket. None of the other partners in Marsh & Co. knew of the forgeries and frauds; but all the same they had to refund the money to their customers.

On the other side of the question, as showing that innocent partners will not be held liable unless the money misappropriated was entrusted to them in the "usual course of the firm's business," is the case of *Cleather v. Twisden*. A trustee had invested money in bonds payable to bearer, which bonds he took to his solicitors', saw the junior partner, and asked him to take care of the precious documents. The junior partner consented, and put the papers in the firm's safe. But not for long; for he soon took them out again, sold them, pocketed the proceeds, and, to use the expressive Americanism, "left." Then the trustee asked the scoundrel's co-partners to make good the loss. They, however, declined, and the Court upheld them in their refusal. Why? Because it is no part of a solicitor's ordinary business to take care of his client's bonds and other securities—except, perhaps, mortgage deeds and other documents relating to land.

You must be very careful, also, to draw the distinction between a fraud committed by a partner when pretending to act for his firm, and one committed by him when acting in his private capacity. Tom was a partner in a bank. Dick was a friend of his, and was also a customer of the bank. Said Tom one day,



"Dick, if I were you I should sell out some stock. I know of a good investment. My son wants £5,000, for which he will pay 5 per cent., and give good security." Dick accordingly authorised £5,000 worth of stock to be sold, the money to be paid to his account at the bank. Then he drew a cheque in favour of Tom, who cashed it, and with the £5,000 so handsomely provided, left the country for a tour. He left no address and did not return. Dick became anxious and made inquiries; and in the end demanded that the bank (*i.e.* the innocent partners) should make good the £5,000. "Not so," was the reply, "this was a private matter between Tom and you." "But I should never have given him the cheque had he not been a partner in your firm," was Dick's answer; and the bankers retorted, "Very likely you would not. But you gave him the cheque to cash in his capacity as a friend of your own, in order to make an investment of a private character—not an investment to be made by our firm. It was not a partnership swindle, but a little fraud upon Tom's own account." And the Court of Chancery agreed with the bankers.

**Continuing guarantys.**—By a continuing guaranty [which is called in Scotland a cautionary obligation] I mean such a thing as this: Smith wishes to obtain goods on credit from Jones & Co., but that firm does not consider him of sufficient standing. Wherefore Smith goes to Bell, a friend of well-known standing, and asks him if he will stand as surety for him. Bell agrees, and signs a paper to this effect:—

To Jones & Co., Cardiff. In consideration of your allowing Joseph Smith to purchase goods from you on a running account, I undertake to guarantee his account up to £100

TIMOTHY BELL.

This guaranty continues in force until Bell cancels it, or until Jones & Co. are obliged to come upon him by virtue of it.

Should a change take place in the constitution of Jones & Co., the guarantee is cancelled. Thus, if one partner dies or retires, the guaranty is cancelled. Should a new partner be admitted, again it is cancelled. And if we reverse the positions, the result is the same. For instance, suppose Jones & Co. become sureties for Smith when he obtains credit from Bell. A change in the constitution of Jones & Co. cancels their guaranty.

**The individual liabilities of partners.**—In this respect, the law of England and Scotland differs considerably. In Scotland, a firm is considered as a person quite separate from the partners who compose it. Thus, the firm of Campbell, McLeod & Macgregor, consisting of John Campbell, Robert McLeod, and Gregor Macgregor, is a person in the eye of the law entirely separate from the three gentlemen who compose it. In England the three would merely be considered as three men trading under a particular name. The consequences are serious. Thus, in England, one partner cannot, in his individual capacity, bring an action against the firm; but in Scotland he can. Moreover, in Scotland the same persons may form several distinct firms for distinct and different businesses. In England, such a thing could not be recognised.

A partner in a Scottish firm is individually liable for the firm's debts. He

is liable; but he is only liable in the same way that you would be if you were to guarantee the debt of another person. Thus, if you guarantee to pay a debt owing by Swiveller to Brass, you are only liable if Swiveller does not pay when he ought to. So, in the above firm, John Campbell is only personally liable to pay a debt of the firm, if the firm does not pay when it ought to. Therefore, if the firm does not pay its debts, you can, seeing that it is a Scottish firm, go for each one of the partners individually. And more than that—you can come upon Campbell first, if you like, and if he does not pay, then upon McLeod; and if he does not pay, then upon Macgregor. This seems to be the effect of the Act (section 9), though some Scottish lawyers have doubted whether you ought not first to bring an action against the firm before you can sue the individual partners. Moreover, you can, after getting judgment against the firm, have diligence [*Anglicè*, execution] against any individual partner's goods.

In England you cannot do this. Suppose Brown, Jones & Co. of London owe you £100, and you, thinking the firm consists only of Brown and Jones, bring an action against those two, and are successful. You are successful, I mean, in obtaining a judgment in your favour; for when you attempt to seize the partnership goods, you find there are none; and when you try to seize the private property of Jones and of Brown, you discover that they have no property to seize. Then you hear that Robinson, the prosperous Robinson, is a partner in Jones, Brown & Co. He is, in fact, the "Co." When you hear it, you jump for joy. Your £100 seems at last to have returned from the limbo of bad debts. Vain hope! Not one penny can you squeeze out of Robinson; for in merry England all partnership debts are "joint," not "several," as the Partnership Act declares. Which means, in practice, that when once you have got judgment against one or more partners individually, the others go scot-free.

The difference is expressed in the Act thus: "Every partner is liable jointly with the other partners" [*this applies to both countries*], "and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner."

There are one or two exceptions to the English rule. In the first place, when the members of a firm are liable to an outsider for a fraud, wrongful act, or omission, or misapplication or misappropriation of money (pp. 596-600), every partner is "severally" liable.

Secondly, if a partner dies, his estate is "severally" liable to the creditors of his firm for all debts whatsoever. But note the fact that the firm's creditors can claim nothing unless there is enough to pay all the dead man's private creditors first.

**The liability of the firm for the private debts of a partner.**—To be brief, there is no such liability. Now let me take the case of Mr. Richard Swiveller, who owes you £20 for a little "temporary accommodation." Mr. Swiveller has no furniture, no lands or goods, "no nuthin," in fact—except that he is junior partner in the well-known firm of Micawber & Swiveller. What are you to do? Well, you must proceed in the ordinary way in the Court against Mr. Swiveller personally; and if he does not pay up, you



will be allowed to attach (England) or arrest (Scotland) his partnership share, and pay yourself. Not that you will become a partner in the firm. Not a bit of it. You will only be entitled to receive the profits that Swiveller would otherwise be entitled to, until your debt is paid. Micawber can at any time pay you off, and then repay himself out of Swiveller's profits. And if the Court orders Swiveller's share to be sold, Micawber may buy it—if he can and will.

In England, if a partner's share is thus "attached" for his private debt, the other partners can immediately insist on a dissolution.

When I say, in this sub-section, that you, a private creditor, can seize and sell Swiveller's share in the partnership, I do not mean that you can seize and sell any single article belonging to the firm. By no means. A share in a partnership means this—that after payment of all liabilities the partner has a right to share in profits. And when the firm is dissolved, he has the right to have everything sold, debts paid to creditors, capital repaid to partners, and finally the balance (if any) divided as profits. (*See p. 576.*)

END OF VOL. I.

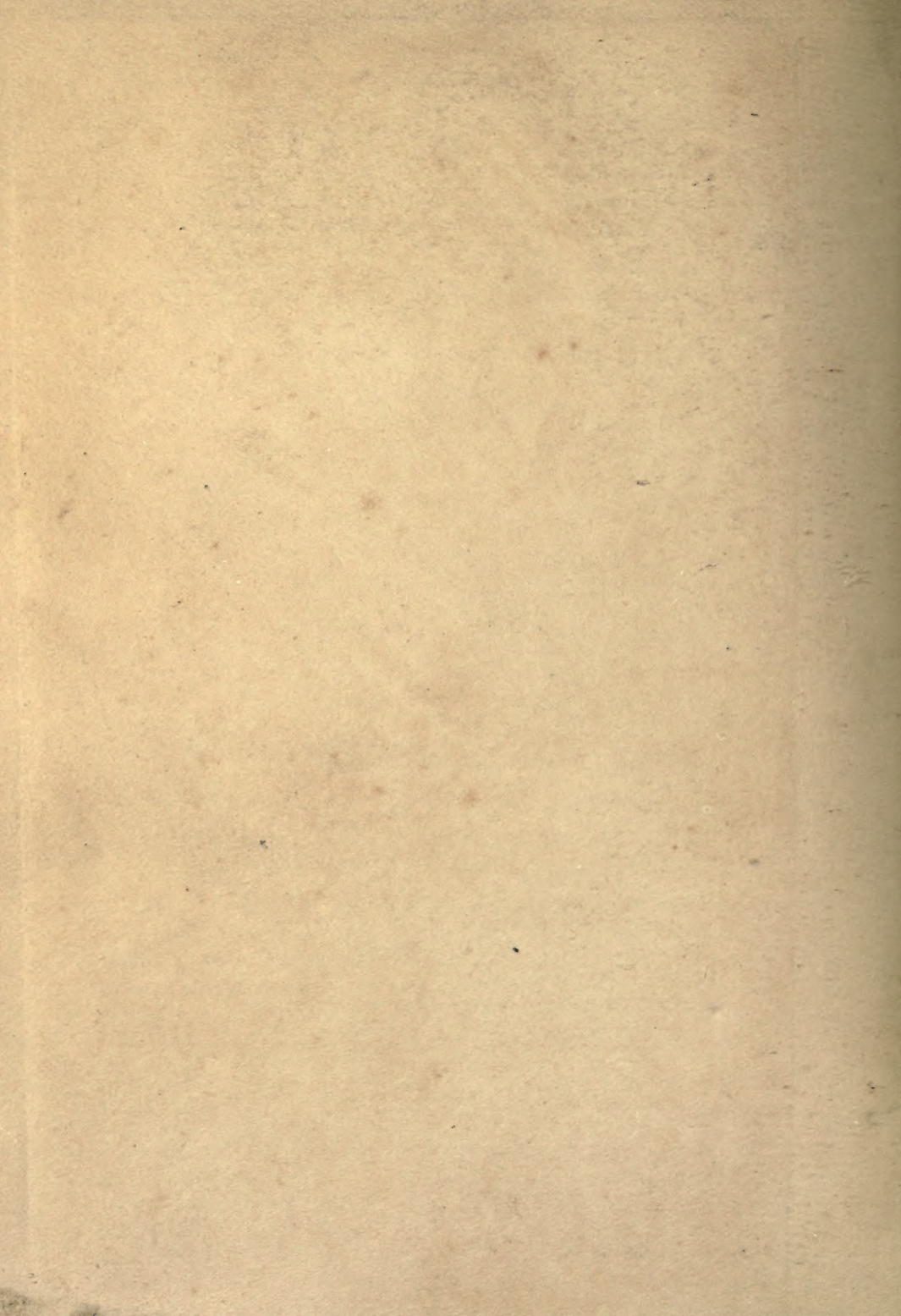












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